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ACTS AND JOINT RESOLUTIONS

A. C. Hill
OF THE

GENERAL ASSEMBLY

OF THE

STATE OF SOUTH CAROLINA,

PASSED AT THE

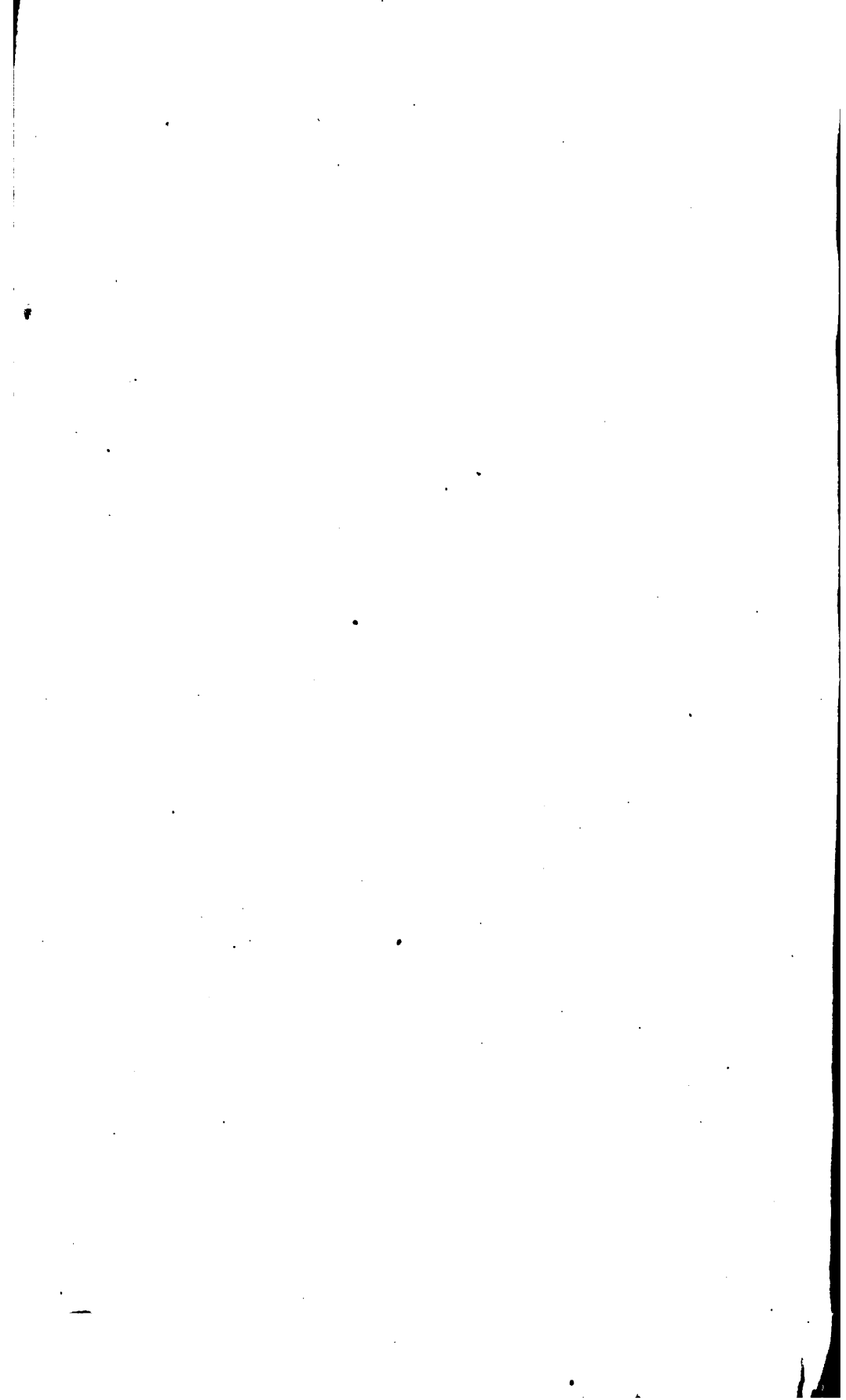
REGULAR SESSION OF 1869-'70.

PART II,

CONTAINING THE CODE.

PRINTED BY ORDER OF THE GENERAL ASSEMBLY, AND DESIGNED TO
FORM A PART OF THE FOURTEENTH VOLUME OF THE STATUTES
AT LARGE, COMMENCING WITH THE ACTS OF 1868.

COLUMBIA, S. C.:
JOHN W. DENNY, PRINTER TO THE STATE.
1870.



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ERRATA.

On page 440, Section 84, in fifth line, read "Circuit," instead of "Supreme Court."

On page 475, Section 252, in fourteenth line, read "Clerk of the Court of Common Pleas," instead of "Clerk of the County."

On page 490, Section 307, in thirteenth and fourteenth lines, read "Clerk of the Circuit Court," instead of "Clerk of the County."

On page 521, Section 439, in third line, read "provided," instead of "prescribed."

THE CODE OF PROCEDURE

OF THE

STATE OF SOUTH CAROLINA,

Passed by the General Assembly at the Regular Session, which was begun and held at the city of Columbia, on the fourth Tuesday in November, A. D. 1869, and was adjourned, without day, on the first day of March, A. D. 1870.

ROBERT K. SCOTT, Governor. D. T. CORBIN and CHAS. W. MONTGOMERY, Presidents of the Senate. FRANKLIN J. MOSES, JR., Speaker of the House of Representatives.

AN ACT TO REVISE, SIMPLIFY AND ABRIDGE THE RULES, PRACTICE, PLEADINGS AND FORMS OF COURTS IN THIS STATE.

A. D. 1870.

No. 300.

Whereas, it is provided that the present forms of actions and pleadings in cases at common law should be abolished; that the distinction between legal and equitable remedies should no longer continue; and that an uniform course of proceeding in all cases should be established; therefore,

Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same:

- SEC. 1. Division of Remedies.
2. Definition of an action.
3. Definition of a special proceeding.
4. Division of actions into civil and criminal.
5. Definition of a criminal action.
6. Definition of a civil action.
7. Civil and criminal remedies not merged in each other.
8. Division of this Act.

SEC. 1. Remedies in the Courts of Justice are divided into: 1. Actions; Remedies.
2. Special proceedings.

SEC. 2. An action is an ordinary proceeding in a Court of Justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence. Action.

SEC. 3. Every other remedy is a special proceeding. Special Proceeding.

SEC. 4. Actions are of two kinds: 1. Civil; 2. Criminal. Division of Actions.

SEC. 5. A criminal action is prosecuted by the State, as a party, against a person charged with a public offence, for the punishment thereof. Criminal Action.

SEC. 6. Every other is a civil action. Civil Action

A. D. 1870. **SEC. 7.** Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

Remedies not merged. **SEC. 8.** This Act is divided into two parts: The first relates to Courts of Justice and their jurisdiction. The second relates to civil actions in the Courts of this State.

Division of Act.

PART I.

OF THE COURTS OF JUSTICE AND THEIR JURISDICTION.

TITLE I.

CHAPTER I.

SEC. 9. The several Courts of this State.

10. Their jurisdiction generally.

The several Courts.

SEC. 9. The following are the Courts of Justice in this State:

1. The Court for Trial of Impeachments.
2. The Supreme Court.
3. Two Circuit Courts, to wit: (1.) A Court of Common Pleas; and (2.) A Court of General Sessions.
4. Probate Courts.
5. Courts of Justices of the Peace.
6. Courts of Trial Justices.
7. The City Court of Charleston.
8. Mayors' and Intendants' Courts.

Their jurisdiction generally.

SEC. 10. These Courts shall exercise the jurisdiction now vested in them respectively, except as otherwise prescribed by this Act.

TITLE II.

SUPREME COURT.

SEC. 11. Its jurisdiction.

12. Power of Court.
13. Terms. Preference of Causes.
14. Judgment, rehearing. Opinions.
15. Sheriffs to provide rooms, &c.
16. Courts, where held. Adjournment.

Jurisdiction.

SEC. 11. The Supreme Court shall have exclusive jurisdiction to review upon appeal:

Of final judgment.

1. Final judgments in actions commenced in the Courts of Common Pleas and General Sessions, brought there by original process or removed there from any inferior Court or jurisdiction; and upon the appeal from such judgment, to review any intermediate order involving the merits, and necessarily affecting the judgment.

2. An order affecting a substantial right made in an action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken, or discontinues the action, and when such order grants or refuses a new trial; but no appeal to the Supreme Court from an order granting a new trial, on a case made or bill of exceptions, shall be effectual for any purpose, unless the notice of appeal contain an assent on the part of the appellant, that if the order be affirmed, judgment absolute shall be rendered against the appellant. Upon every appeal from an order granting a new trial, on a case made or on exceptions taken, if the Supreme Court shall determine that no error was committed in granting the new trial, they shall render judgment absolute upon the right of the appellant; and after the proceedings are remitted to the Court from which the appeal was taken, an assessment of damages or other proceedings, to render judgment effectual, may be then and there had in cases where such subsequent proceedings are requisite.

A. D. 1870.

Of order affecting a substantial right

Condition of appeal from order granting new trial

3. A final order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, and upon such appeal to review any intermediate order involving the merits, and necessarily affecting the order appealed from.

Final order affecting substantial right.

SEC. 12. The Supreme Court may reverse, affirm or modify the judgment, decree or order appealed from, in whole or in part, and as to any or all of the parties; and its judgment shall be remitted to the Court below, to be enforced according to law.

Power of Supreme Court.

SEC. 13. The Supreme Court shall hold annually, at the seat of government, two sessions, the one commencing on the fourth Tuesday of November, and the other the first Tuesday of April; and each of said terms shall be continued for so long a period as the public interest may require.

Terms.

Additional Terms may be appointed and held at such times and places as the Court may direct, when the public interest requires it. The Court may, by general rules, provide what causes shall have a preference on the calendar. On a second and each subsequent appeal to the Supreme Court, or when an appeal has once been dismissed for defect or irregularity, the cause shall be placed upon the calendar as of the time of filing the first appeal, and may be noticed and put on the calendar for any succeeding Term; and whenever, in any action or proceeding in which the State, or any State officer, or any Board of State officers, is or are sole Plaintiff or Defendant, an appeal has been, or shall be, brought up from any judgment or order for or against him or them, in any Court, such appeal shall have preference in the Supreme Court, and may be moved by either party out of the order on the calendar.

Preference of causes.

SEC. 14. The concurrence of two Judges is necessary to pronounce a judgment. If two do not concur, the case must be reheard. But no more than two rehearings shall be had; and if, on the second rehearing, two Judges do not concur, the judgment shall be affirmed.

Judgments.

Rehearing.

When two of the Judges do not concur, and a rehearing of the case is ordered, the Judges shall file the opinions read by them with the Reporter of the Court, but such opinions shall not be published. No person other than the Judges of the Court, the Reporter of the Court, or the counsel or attorney of either of the parties to the action, shall have access to, or a copy of the said opinions, but such counsel or attorney may have access to and a copy thereof.

Opinions.

A. D. 1870.

Sheriff to provide rooms.

SEC. 15. If, at a term of the Supreme Court, proper and convenient rooms, both for the consultation of the Judges and the holding of the Court, with furniture, attendants, fuel, lights and stationery, suitable and sufficient for the transaction of its business, be not provided for in the place where by law the Court may be held; the Court may order the Sheriff of the County to make such provision, and the expense incurred by him in carrying the order into effect shall be a County charge.

Courts, where held.

Adjournment

SEC. 16. The Supreme Court may be held in other buildings than those designated by law as places for holding Courts, and at a different place, in the same city or town from that at which it is appointed to be held. Any one or more of the Judges may adjourn the Court with the like effect as if all were present.

TITLE III.

CIRCUIT COURTS.

SEC. 17. Division of the State into Circuits.

18. Time of holding Courts in First Circuit.
19. Time of holding Courts in Second Circuit.
20. Time of holding Courts in Third Circuit.
21. Time of holding Courts in Fourth Circuit.
22. Time of holding Courts in Fifth Circuit.
23. Time of holding Courts in Sixth Circuit.
24. Time of holding Courts in Seventh Circuit.
25. Time of holding Courts in Eighth Circuit.
26. Judges to hold Circuit Court.
27. Judges' power to adjourn Court Common Pleas.
28. Special Sessions of Circuit Courts.
29. Petit Jurots in Common Pleas and General Sessions.
30. Adjournment of Circuit Courts.
31. Qualification of Judges.
32. Circuit Courts made Courts of Record.
33. Clerk and Deputy Clerk of Circuit Courts.
34. Transfer of causes from Court of Chancery.

SEC. 17. The State is divided into eight Circuits, as follows :

- | | |
|------------------|--|
| First Circuit. | 1. The Counties of Charleston and Orangeburg shall constitute the First Circuit. |
| Second Circuit. | 2. The Counties of Beaufort, Colleton and Barnwell shall constitute the Second Circuit. |
| Third Circuit. | 3. The Counties of Sumter, Clarendon, Williamsburg, Georgetown and Horry shall constitute the Third Circuit. |
| Fourth Circuit. | 4. The Counties of Chesterfield, Marlboro, Marion, Darlington and Fairfield shall constitute the Fourth Circuit. |
| Fifth Circuit. | 5. The Counties of Kershaw, Richland, Edgefield and Lexington shall constitute the Fifth Circuit. |
| Sixth Circuit. | 6. The Counties of Chester, Lancaster, York and Union shall constitute the Sixth Circuit. |
| Seventh Circuit. | 7. The Counties of Newberry, Laurens and Spartanburg shall constitute the Seventh Circuit. |

8. The Counties of Greenville, Anderson, Oconee, Pickens and Abbeville shall constitute the Eighth Circuit.

A. D. 1870.

SEC. 18. The Circuit Courts in the First Circuit shall be held as follows :

Eighth Circuit.

1. The Court of General Sessions, at Charleston, for the County of Charleston, on the first Monday of February, June and November ; and the Court of Common Pleas, at Charleston, for the County of Charleston, on the second Monday of February, June and November.

First Circuit.

2. The Court of General Sessions, at Orangeburg, for the County of Orangeburg, on the first Monday of January, May and September ; and the Court of Common Pleas, at Orangeburg, for the County of Orangeburg, on the first Wednesday after the first Monday of January, May and September.

Orangeburg.

SEC. 19. The Circuit Courts in the Second Circuit shall be held as follows :

Second Circuit.

1. The Court of General Sessions, at Beaufort, for the County of Beaufort, on the third Monday of February, June and October ; and the Court of Common Pleas, in Beaufort, for the County of Beaufort, on the fourth Monday of February, June and October.

Beaufort.

2. The Court of General Sessions, at Walterboro, for the County of Colleton, on the third Monday of March, July and November ; and the Court of Common Pleas, at Walterboro, for the County of Colleton, on the first Thursday after the third Monday of March, July and November.

Colleton.

3. The Court of General Sessions, at Blackville, for the County of Barnwell, on the second Monday of April, August and December ; the Court of Common Pleas, at Blackville, in the County of Barnwell, on the first Thursday after the second Monday of April, August and December.

Barnwell.

SEC. 20. The Circuit Courts in the Third Circuit shall be held as follows :

1. The Court of General Sessions, at Sumter, for the County of Sumter, on the first Monday of January, May and October ; and the Court of Common Pleas, at Sumter, for the County of Sumter, on the first Wednesday after the first Monday of January, May and October.

Sumter.

2. The Court of General Sessions, at Manning, for the County of Clarendon, on the third Monday of January, May and October ; and the Court of Common Pleas, at Manning, for the County of Clarendon, on the first Wednesday after the third Monday of January, May and October.

Clarendon.

3. The Court of General Sessions, at Kingstree, for the County of Williamsburg, on the fourth Monday of January, May and October ; and the Court of Common Pleas, at Kingstree, for the County of Williamsburg, on the first Wednesday after the fourth Monday of January, May and October.

Williamsburg

4. The Court of General Sessions, at Georgetown, for the County of Georgetown, on the first Monday after the fourth Monday of January, May and October ; and the Court of Common Pleas, at Georgetown, for the County of Georgetown, on the first Wednesday after the first Monday after the fourth Monday of January, May and October.

Georgetown.

5. The Court of General Sessions, at Conwayboro, for the County of Horry, on the second Monday after the fourth Monday of January, May and October ; and the Court of Common Pleas, at Conwayboro, for the County of Horry, on the first Wednesday after the second Monday after the fourth Monday of January, May and October.

Horry.

A. D. 1870.

SEC. 21. The Circuit Courts in the Fourth Circuit shall be held as follows :

Fourth Cir-
cuit.

Chesterfield.

Marlboro.

Marion.

Darlington.

Fairfield.

1. The Court of General Sessions, at Chesterfield, for the County of Chesterfield, on the first Monday of January, May and August ; and the Court of Common Pleas, at Chesterfield, for the County of Chesterfield, on the first Wednesday after the first Monday of January, May and August.

2. The Court of General Sessions at Bennettsville, for the County of Marlboro, on the third Monday of January, May and August ; and the Court of Common Pleas at Bennettsville, for the County of Marlboro, on the first Wednesday after the third Monday of January, May and August.

3. The Court of General Sessions at Marion, for the County of Marion, on the first Monday of February, June and September ; and the Court of Common Pleas at Marion, for the County of Marion, on the first Wednesday after the first Monday of February, June and September.

4. The Court of General Sessions at Darlington, for the County of Darlington, on the third Monday of February, June and October ; and the Court of Common Pleas at Darlington, for the County of Darlington, on the first Wednesday after the third Monday of February, June and October.

5. The Court of General Sessions at Winnsboro, for the County of Fairfield, on the second Monday of March, July and November ; and the Court of Common Pleas at Winnsboro, for the County of Fairfield, on the first Wednesday after the second Monday of March, July and November.

SEC. 22. The Circuit Courts in the Fifth Circuit shall be held as follows :

Fifth Circuit.

Kershaw.

Richland.

Edgefield.

Lexington.

Sixth Circuit.

Chester.

Lancaster.

1. The Court of General Sessions at Camden, for the County of Kershaw, on the first Monday of January, May and September ; and the Court of Common Pleas at Camden, for the County of Kershaw, on the first Wednesday after the first Monday of January, May and September.

2. The Court of General Sessions at Columbia, for the County of Richland, on the first Monday of February, June and October ; and the Court of Common Pleas at Columbia, for the County of Richland, on the first Wednesday after the first Monday of February, June and October.

3. The Court of General Sessions at Edgefield, for the County of Edgefield, on the first Monday of March, July and November ; and the Court of Common Pleas at Edgefield, for the County of Edgefield, on the first Wednesday after the first Monday of March, July and November.

4. The Court of General Sessions at Lexington, for the County of Lexington, on the first Monday of April, August and December ; and the Court of Common Pleas at Lexington, for the County of Lexington, on the first Wednesday after the first Monday of April, August and December.

SEC. 23. The Circuit Courts in the Sixth Circuit shall be held as follows :

1. The Court of General Sessions at Chesterville, for the County of Chester, on the first Monday of January, May and September ; and the Court of Common Pleas at Chesterville, for the County of Chester, on the first Wednesday after the first Monday of January, May and September.

2. The Court of General Sessions at Lancaster, for the County of

Lancaster, on the first Monday of February, June and October; and the Court of Common Pleas at Lancaster, for the County of Lancaster, on the first Wednesday after the first Monday of February, June and October.

A. D. 1870.

8. The Court of General Sessions at Yorkville, for the County of York, on the first Monday of March, July and November; and the Court of Common Pleas at Yorkville, for the County of York, on the first Wednesday after the first Monday of March, July and November.

York.

4. The Court of General Sessions at Unionville, for the County of Union, on the first Monday of April, August and December; and the Court of Common Pleas at Unionville, for the County of Union, on the first Wednesday after the first Monday of April, August and December.

Union.

SEC. 24. The Circuit Courts in the Seventh Circuit shall be held as follows:

Seventh Circuit.

1. The Court of General Sessions at Newberry, for the County of Newberry, on the third Monday of January, May and September; and the Court of Common Pleas at Newberry, for the County of Newberry, on the first Wednesday after the third Monday of January, May and September.

Newberry.

2. The Court of General Sessions at Laurensville, for the County of Laurens, on the third Monday of February, June and October; and the Court of Common Pleas at Laurensville, for the County of Laurens, on the first Wednesday after the third Monday of February, June and October.

Laurens.

3. The Court of General Sessions at Spartanburg, for the County of Spartanburg, on the third Monday of March, July and November; and the Court of Common Pleas at Spartanburg, for the County of Spartanburg, on the first Monday after the third Monday in March, July and November.

Spartanburg.

SEC. 25. The Circuit Courts in the Eighth Circuit shall be held as follows:

Eighth Circuit.

1. The Court of General Sessions at Greenville, for the County of Greenville, on the second Monday of January, May and September; and the Court of Common Pleas at Greenville, for the County of Greenville, on the first Wednesday after the second Monday of January, May and September.

Greenville.

2. The Court of General Sessions at Anderson, for the County of Anderson, on the fourth Monday of January, May and September; and the Court of Common Pleas at Anderson, for the County of Anderson, on the first Wednesday after the fourth Monday of January, May and September.

Anderson.

3. The Court of General Sessions at Walhalla, for the County of Oconee, on the second Monday of March, July and November; and the Court of Common Pleas at Walhalla, for the County of Oconee, on the first Wednesday after the second Monday of March, July and November.

Oconee.

4. The Court of General Sessions at New Pickens, for the County of Pickens, on the fourth Monday of March, July and November; and the Court of Common Pleas at New Pickens, for the County of Pickens, on the first Wednesday after the fourth Monday of March, July and November.

Pickens.

5. The Court of General Sessions at Abbeville, for the County of Abbeville.

Abbeville.

A. D. 1870.

beville, on the third Monday of February, June and October; and the Court of Common Pleas at Abbeville, for the County of Abbeville, on the first Wednesday after the third Monday in February, June and October.

The Judges
to hold Cir-
cuit Courts.

SEC. 26. The Judges elected and commissioned for the several Circuits shall hold the Courts of Common Pleas and General Sessions for the several Counties in their respective Circuits: Provided, Said Judges shall interchange Circuits, upon their request to, and order of, the Chief Justice, or upon the order of the Chief Justice without such request, whenever, in his judgment, it shall be deemed advisable.

Judge's pow-
er to adjourn
Court of Com-
mon Pleas.

SEC. 27. Should the business before the Court of General Sessions, at any term, not be completed on the arrival of the day fixed by law for the holding of the Court of Common Pleas for said County, the Judge presiding may, in his discretion, adjourn said Court of Common Pleas until the said business of the Court of General Sessions shall have been concluded.

Special Ses-
sions of Cir-
cuit Courts.

SEC. 28. The several Circuit Judges shall have power to hold special sessions within their respective Circuits, at any time in their discretion, or at the discretion of the Chief Justice, of which the Judge presiding shall give such notice as the Chief Justice may direct, or as may, in his judgment, be necessary, should no directions be given. The Clerk of such Court shall, at least fifteen days before the commencement of such special session, cause the time and place for holding the same to be notified, for at least two weeks, successively, in one or more of the newspapers published nearest the place where the session is to be holden. All processes, writs and recognizances of every kind, whether respecting juries, witnesses, bail, or otherwise, which relate to the cases to be tried at the said special session, shall be considered as belonging to such sessions, in the same manner as if they had been issued or taken in reference thereto. All business depending for trial at any special session shall, at the close thereof, be considered as of course removed to the next stated term of the Court. Said special session shall be held in pursuance of an order which shall be transmitted to the Clerk of the Court, and by him entered on the records of the Court.

Petit Jurors
in Common
Pleas & Gen-
eral Sessions.

SEC. 29. Petit jurors summoned to attend the Court of General Sessions in any County, except the County of Charleston, shall also attend and serve as jurors for the Courts of Common Pleas next ensuing in and for said County.

Adjournment
of the Circuit
Courts.

SEC. 30. The Judge of the Circuit Court shall have power to direct any Circuit Court in his Circuit to be adjourned over to a future day, designated in a written order to the Clerk of said Court, whenever there is a dangerous and general disease at the place where said Court is usually holden.

Qualification
of Judges.

SEC. 31. The Judges elected and qualified by taking the oath prescribed in the thirtieth Section of the second Article of the Constitution, which oath, to the Judges under the first election, shall be administered by the Governor of the State of South Carolina, who is hereby empowered to administer the same, and to the Judges under any subsequent election by one of the Justices of the Supreme Court, shall forthwith enter upon their duties.

Circuit Courts
made Courts
of Record.

SEC. 32. The Circuit Courts herein established shall be the Courts of record, and the books of record thereof shall at all times be subject to the inspection of any person interested therein.

SEC. 33. The Clerk elected in each County under the provisions of Section 27 of Article IV of the Constitution, shall be Clerk of the Courts of General Sessions and Common Pleas, and may appoint a deputy, who may perform the duties of Clerk, for whose acts such Clerk shall be responsible; and a record of whose appointment shall be made in the Clerk's office; and such appointment may be revoked at the pleasure of the Clerk; and in case no Clerk exists, the Judge shall have authority to appoint a person, who shall perform the duties of Clerk, and said Deputy Clerk, or the one appointed by the Judge, shall be required to give the usual bond before entering upon the duties of the office.

A. D. 1870.

Clerk and
Deputy Clerk
of the Circuit
Court.

SEC. 34. All suits in Equity depending in the Courts of Chancery, and not finally disposed of, and the property and records relating thereto, on the first day of January, A. D. 1869, shall be transferred to the Courts of Common Pleas in and for the respective Counties, and shall be entered upon the dockets of said Courts for the stated term thereof next ensuing, and thereupon shall be heard, tried and determined, with all rights respected and preserved, in the same manner as if originally brought there: Provided, That no cause shall be transferred to the dockets of the Courts aforesaid, not cognizable therein under the Constitution: Provided, further, That all causes depending as aforesaid, and the property and records pertaining thereto, cognizable under the Constitution in the Courts of Probate, shall be transferred to said Courts.

Transfer of
causes from
the Courts of
Chancery.

TITLE IV.

PROBATE COURT.

SEC. 35. Sessions.

36. Court of Record.

37. Duties of Clerk.

38. Jurisdiction of Judges.

39. In relation to Guardians.

40. Titles and partition of Real Estate.

41. Settlement of Estate in the County where will proved.

42. All proceedings relative to Estates under Guardianship had in the Court of Probate.

43. Judges not to act when interested. When Judges of adjoining County to act.

44. Power to administer Oath.

45. Probate Court may issue Warrants and Processes.

46. In cases of Contumacy may commit to Jail.

47. When Depositions may be taken and used.

48. Exclusive Jurisdiction after once acquired.

49. Jurisdiction not to be collaterally impeached.

50. When minor may choose guardian; guardian interested; where appointed.

51. Authorized to permit sale and settle accounts of guardian.

52. Judges may appoint times and places for holding Courts.

53. Open at all times for certain business.

54. Adjournment of Court. When by Clerk.

A. D. 1870.

- SEC. 55. Appellate jurisdiction of Circuit Court.
 56. Jurisdiction of Supreme Court in Probate matters.
 57. Appeal to the Circuit Court to be taken within fifteen days.
 58. Appellant to give bond to prosecute appeal.
 59. Grounds of appeal to be filed.
 60. Certified copies of record to be filed in Circuit Court.
 61. Proceedings stayed by appeal.
 62. How Circuit Court proceed to the trial.
 63. Costs given to prevailing party.
 64. Appellant neglecting to enter appeal, judgment affirmed with costs.
 65. Final decision to be certified to Probate Court.
 66. Probate Judge not to have voice in determining appeal.
 When may practice law.
 67. All proceedings to be commenced by petition.
 68. Supreme Court to make rules.
 69. County Commissioners to provide all books, etc.
 70. Judge may keep order and punish contempt.
 71. Processes of Court—how executed.
 72. Judge may commit lunatics, etc., to Lunatic Asylum.
 73. Laws of Provisional Government, how far adopted. Transfer of record.

Sessions.

SEC. 35. A Court of Probate is hereby established in each of the several Counties in the State, which shall hold a session on the first Monday of each month at or near the court house, and continue thereafter so long as the business may require.

Court of Record.

SEC. 36. The Court of Probate shall be a Court of Record, and have a seal, may appoint a Clerk, and may remove him at pleasure, and on failure of the Court to appoint such Clerk, the Judge of the Court may perform all the duties of Clerk.

Duties of the Clerk.

SEC. 37. The Clerk of the Court of Probate shall keep a true and fair record of each order, sentence and decree of the Court, and of all other things proper to be recorded; and on the legal fees being paid, shall give true and attested copies of the files and proceedings of the Court. All copies so attested shall be legal evidence in the Courts of this State.

Jurisdiction of Judges.

SEC. 38. Every Judge of Probate, in his County, shall have jurisdiction in all matters testamentary, and of administration in business appertaining to minors and the allotment of dower, cases of idiocy and lunacy, and persons *non compos mentis*.

In relation to Guardians.

SEC. 39. The Judge of Probate shall have jurisdiction in relation to the appointment and removal of guardians of minors, insane and idiotic persons, and persons *non compos mentis*, and in relation to the duties imposed by law on such guardians, and the management and disposition of the estates of their wards. He shall exercise original jurisdiction in relation to trustees appointed by will in cases prescribed by law.

Titles and partition of real estate.

SEC. 40. He may exercise jurisdiction of all petitions for partition of real estate where no dispute exists in relation to the title thereof; and when the title to such real estate is disputed, he shall refer the same to the Circuit Court for adjudication, unless the parties shall consent to his determination of the same. The probate of the will and the granting of administration of the estate of any person deceased shall belong to the

Judge of Probate for the County in which such person was last an inhabitant; but if such person was not an inhabitant of this State, the same shall belong to the Judge of Probate in any County in which the greater part of his or her estate may be.

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SEC. 41. All proceedings in relation to the settlement of the estate of any person deceased shall be had in the Probate Court of the County in which his will was proved or administration of estate was granted.

Settlement of estate in County where will is proved.

SEC. 42. All proceedings in relation to the property or estate of any person under guardianship shall be had in the Court of Probate of the County in which the guardian was appointed.

All proceedings relative to estates under guardianship had in Court of Probate.

SEC. 43. No Judge of Probate shall act as such in the settlement of any estate wherein he is interested as heir or legatee, executor or administrator, or as guardian or trustee of any person; in every such case the Judge of Probate of any adjoining County shall have jurisdiction, and it shall be his duty, upon application, to attend at some term of the Court of Probate in which such case may be pending, which shall not interfere with the duties in his own County, and hear and determine such case.

Judges not to act when interested. — In such cases Judges of adjoining County to act.

SEC. 44. The Judge or Clerk of the Probate Court shall have power to administer all oaths necessary in the transaction of business before the Probate Court, and all oaths required by law to be administered to persons executing trust under the appointment of said Court.

Power to administer oath

SEC. 45. Probate Courts may issue all warrants and processes, in conformity to the rules of law, which may be necessary to compel the attendance of witnesses, or to carry into effect any order, sentence or decree of such Courts, or the powers granted them by law.

The Probate Court may issue Warrants and Processes

SEC. 46. If any person shall refuse or neglect to perform any order, sentence or decree of a Probate Court, such Court may issue a warrant, directed to any Sheriff or Constable in the State, requiring him to apprehend and imprison such person in the common jail of the County; and if there be no jail of the County, then in the jail of the adjoining County, until he shall perform such order, sentence or decree, or be delivered by due course of law.

In cases of contumacy to commit to jail

SEC. 47. When a witness whose testimony is necessary to be used before any Probate Court shall reside out of this State, (or more than thirty miles from the place of holding Court,) or by reason of age or bodily infirmity shall be unable to attend in person, the Court may issue a commission to one or more competent persons to take the testimony of such witness; and depositions taken according to the provisions of the law for taking depositions to be used on the trial of civil causes may be used on the trial of any question before the Probate Court where such testimony may be proper.

When depositions may be taken and used.

SEC. 48. When any Probate Court shall have first taken cognizance of the settlement of the estate of a deceased person, such Court shall have jurisdiction of the disposition and settlement of all the estate of such deceased person to the exclusion of all other Probate Courts.

Exclusive jurisdiction after once acquired.

SEC. 49. The jurisdiction assumed by any Probate Court in any case, so far as it depends on the place of residence or the location of his estate, shall not be contested in any suit or proceeding whatever, except in an appeal from the Probate Court in the original case, or when the want of jurisdiction appears on the record.

Jurisdiction not to be collaterally impeached.

SEC. 50. When, by law, a guardian is required to be appointed of a minor, who is interested as heir or legatee, or representative of such heir

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Guardian interested—where to appoint. When a minor may choose guardian.

Authorized to permit sale and to settle accounts of guardian.

Judges may appoint times and places for holding Probate Courts.

Open at all times for certain business.

Of adjournment of Court—when by the Clerk.

Appellate jurisdiction of Circuit Court.

Jurisdiction of Supreme Court in Probate matters.

Appeal to the Circuit Court to be taken within fifteen days.

Appellant to give bond to prosecute appeal.

Grounds of appeal to be filed.

Certified copies of Record to be filed in Circuit Court.

Proceedings stayed by appeal.

or legatee, in any estate which is in a course of settlement, such guardian shall be appointed by the Probate Court before which such estate is in course of settlement; but afterwards, if the minor shall reside in another County, and is of the age of fourteen years, he may choose and have a guardian appointed in the County where he shall reside; and in that case the powers of the first guardian shall cease. In all other cases guardians shall be appointed by the Probate Court of the County where the persons for whom the guardian shall be appointed shall reside.

SEC. 51. The Probate Court, by which a guardian shall be appointed, shall have jurisdiction of the estate of the ward, and shall be alone authorized to permit the sale of such estate, and settle such guardian's accounts.

SEC. 52. Except as provided in the first Section, the Probate Court in each County shall appoint such times and places for holding Courts as shall be judged most convenient for all persons interested, and shall give notice of such times and places in one or more newspapers circulating in the County.

SEC. 53. The Probate Court shall be deemed open at all times for the transaction of ordinary business which may be necessary, when previous notice is not required to be given to the persons interested.

SEC. 54. A Probate Court may be adjourned as occasion may require; and when the Judge is absent at the time for holding a Court the Clerk may adjourn it.

SEC. 55. The Circuit Court shall have appellate jurisdiction of all matters originally within the jurisdiction of the Probate Court.

SEC. 56. The Supreme Court shall have jurisdiction of all questions of law arising in the course of the proceedings of the Circuit Court, in Probate matters, in the same manner as provided by law in other cases.

SEC. 57. Any person interested in any final order, sentence or decree of any Probate Court, and considering himself injured thereby, may appeal therefrom to the Circuit Court in the same County, at the stated session next after such appeal, and such appeal shall be granted by the Probate Court, if application be made and filed in the Clerk's Office within fifteen days from the date of the decision appealed from.

SEC. 58. In all cases of appeal from the proceedings of the Probate Court, before such appeal shall be allowed, the person appealing shall give a bond to the satisfaction of the Probate Court, with a condition that he shall prosecute such appeal to effect, and pay all intervening damages and costs occasioned by such appeal.

SEC. 59. In all cases of appeal the appellant shall file in the Probate Office his grounds of appeal, and cause a copy thereof to be served on the adverse party, at least twelve days before the time when the appeal is to be entered in the Circuit Court.

SEC. 60. The person appealing shall procure and file in the Circuit Court to which such appeal is granted a certified copy of the record of the proceedings appealed from, of the application and grounds for the appeal filed in the Probate Court, and of the allowance of the same, together with the proper evidence that notice has been given to the adverse party according to law.

SEC. 61. When an appeal, according to law, is allowed by the Probate Court, all proceedings in pursuance of the order, sentence or decree appealed from shall cease until the judgment of the Circuit or Supreme

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Final decision to be certified to Probate Court.

No Probate Judge to have voice in determining an appeal. When may practice law.

**Proceedings
to be com-
menced by
partition.**

The Supreme Court to make rules.

County Commissioners to provide books &c.

Judge may keep order & punish contempt.

Processes of Court -- how executed.

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Guardian
interested—
where to ap-
point. When
a minor may
choose guar-
dian.

Anti-
to laws of Pro-
visional Gov-
ernment, how
far adopted.

or legatee. The Judge of the Probate Court may commit to the Lunatic shall be any idiot, lunatic or person *non compos mentis*, who, in his opinion, of seriously mad as to render it manifestly dangerous to the peace and Comity of the community that he or she should be at large; and also, in such other cases provided by law. In all cases the Judge shall certify in what place the said person or persons resided at the time of the commitment, and such certificate shall be conclusive evidence of such residence.

SEC. 73. All laws and parts of laws of the late Provisional Government of South Carolina, relative to the powers, duties and course of procedure of the Courts of Ordinary and Equity, as far as the jurisdiction of said Courts is herein conferred on the Courts of Probate, not inconsistent with the Constitution and this Act, or supplied by it, are hereby adopted and declared to be of force, and applicable to the Courts of Probate.

TITLE V.

OF THE COURTS OF TRIAL JUSTICES.

SEC. 74. Jurisdiction.

75. Qualification of bail.
76. Justification of bail.
77. Allowance of bail.
78. Property, how taken when concealed in building or inclosure.
79. Property, how kept.
80. Claim of property by third person.
81. No jurisdiction in certain cases.
82. Answer of title.
83. Undertaking.
84. Suit discontinued.
85. If undertaking not given.
86. The same.
87. New action.
88. Costs.
89. Answer of title as to one cause of action.
90. Docketing judgments.
91. Rules.

Jurisdiction. SEC. 74. Trial Justices shall have civil jurisdiction in the following actions, and no others:

1. In actions arising on contracts for the recovery of money only, if the sum claimed does not exceed one hundred dollars.
2. An action for damages for injury to rights pertaining to the person, or the personal or real property, if the damages claimed do not exceed one hundred dollars, and in cases of bastardy.
3. An action for a penalty, fine or forfeiture, where the amount claimed or forfeited does not exceed one hundred dollars.
4. An action commenced by attachment of property, as now provided by statute, if the debt or damages claimed do not exceed one hundred dollars.

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5. An action upon bond conditioned for the payment of money, not exceeding one hundred dollars, though the penalty exceed that sum, the judgment to be given for the sum actually due. Where the payments are to be made by installments, an action may be brought for each installment as it becomes due.

6. An action upon a surety bond taken by them, where the penalty or amount claimed does not exceed one hundred dollars.

7. An action upon a judgment rendered in a Court of a Trial Justice or an inferior Court in a city where such action is not prohibited by Section ninety-four.

8. To take and enter judgment on the confession of a Defendant, where the amount confessed shall not exceed one hundred dollars, in the manner prescribed by law.

9. An action for damages, fraud in the sale, purchase or exchange of personal property, if the damages claimed do not exceed one hundred dollars.

10. An action to recover the possession of personal property claimed, the value of which, as stated in the affidavit of the plaintiff, his agent or attorney, shall not exceed the sum of one hundred dollars.

The plaintiff in such action, at the time of issuing the summons, but not afterwards, may claim the immediate delivery of such property as hereinafter provided.

Before any process shall be issued in an action to recover the possession of personal property, the Plaintiff, his agent or attorney, shall make proof by affidavit, showing:

1. That the Plaintiff is the owner, or entitled to immediate possession, of the property claimed, particularly describing the same.

2. That such property is wrongfully withheld or detained by the defendant.

3. The cause of such detention or withholding thereof, according to the best knowledge, information and belief of the person making the affidavit.

4. That said personal property has not been taken for any tax, fine or assessment, pursuant to statute, or seized by virtue of an execution or attachment against the property of said plaintiff; or if so seized, that it is exempt from such seizure by statute.

5. The actual value of said personal property.

On receipt of such affidavit, and an undertaking, in writing, executed by one or more sufficient sureties, to be approved by the Trial Justice before whom such action is commenced, to the effect that they are bound in double the value of such property as stated in said affidavit, for the prosecution of said action, and for the return of said property to the Defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against said Plaintiff, the Trial Justice shall endorse upon said affidavit a direction to any Constable of the County in which said Trial Justice shall reside, requiring said Constable to take the property described therein from the Defendant, and keep the same, to be disposed of according to law; and the said Trial Justice shall at the same time issue a summons directed to the Defendant, and requiring him to appear before said Trial Justice at a time and place to be therein specified, and not more than twelve days from the date thereof, to answer the complaint of said Plaintiff; and the said sum-

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mons shall contain a notice to the Defendant that, in case he shall fail to appear at the time and place therein mentioned, the Plaintiff will have judgment for the possession of the property described in said affidavit, with the costs and disbursements of said action.

The Constable to whom said affidavit, indorsement and summons shall be delivered, shall forthwith take the property described in said affidavit, if he can find the same, and shall keep the same in his custody. He shall thereupon, without delay, serve upon said defendant a copy of such affidavit, notice, and summons, by delivering the same to him personally, if he can be found in said County; if not found, to the agent of the defendant in whose possession said property shall be found; if neither can be found, by leaving such copies at the last or usual place of abode of the defendant, with some person of suitable age and discretion. And shall forthwith make a return of his proceedings thereon, and the manner of serving the same, to the Trial Justice who issued the said summons.

The defendant may at any time after such service, and at least two days before the return-day of said summons, serve upon plaintiff, or upon the Constable who made such service, a notice in writing that he excepts to the sureties in said bond or undertaking; and if he fail to do so, all objection thereto shall be waived. If such notice be served, the sureties shall justify, or the plaintiff give new sureties on the return-day of said summons, who shall then appear and justify, or said Trial Justice shall order said property delivered to defendant, and shall also render judgment for defendant's costs and disbursements.

At any time before the return-day of said summons, the said defendant may, if he has not excepted to plaintiff's sureties, require the return of said property to him upon giving to the plaintiff, and filing same with the Trial Justice, a written undertaking, with one or more sureties, who shall justify before said Trial Justice on the return-day of said summons, to the effect that they are bound in double the value of said property, as stated in plaintiff's affidavit, for the delivery thereof to said plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against said defendant; and if such return be not required before the return-day of said summons, the property shall be delivered to said plaintiff.

Qualifications
of bail.

SEC. 75. The qualification of bail must be as follows:

1. Each of them must be a resident, and householder or freeholder within the State.

2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the Judge or a Trial Justice, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

SEC. 76. For the purpose of justification, each of the bail shall attend before the Judge or a Trial Justice at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the Judge or Trial Justice, in his discretion, may think proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff.

Justification
of bail.

SEC. 77. If the Judge or Trial Justice find the bail sufficient, he shall annex the examination to the undertaking, indorse his allowance thereon,

and cause them to be filed with the Clerk; and the Sheriff shall thereupon be exonerated from liability.

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SEC. 78. If the property, or any part thereof, be concealed in a building or enclosure, the Constable shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his County.

Property—
how taken if
concealed in
inclosure or
building.

SEC. 79. When a Constable shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

Property—
how kept.

SEC. 80. If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto, and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the Constable, the Constable shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, shall indemnify the Constable against such claim, by an undertaking, executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, and freeholders and householders of the County. And no claim to such property, by any other person than the defendant or his agent, shall be valid against the Constable, unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

Claim of prop-
erty by third
person.

The actions so commenced shall be tried in all respects as other actions are tried in Trial Justices' Courts.

The judgment for the Plaintiff may be for the possession, or for the recovery of the possession, or the value thereof, in case a delivery cannot be had, and of damages for the detention. If the property have been delivered to the Plaintiff, and the Defendant claim a return thereof, judgment for the Defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. An execution shall be issued thereon, and if the judgment be for the delivery of the possession of personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs or damages recovered by the same judgment out of the personal property of the party against whom it was rendered, to be specified therein, if a delivery thereof cannot be had. The execution shall be returnable within sixty days after its receipt by the officer, to the Trial Justice who issued the same.

In all actions for the recovery of the possession of personal property, as herein provided, if the property shall not have been delivered to Plaintiff, or the Defendant, by answer, shall claim a return thereof, the Trial Justice or Jury shall assess the value thereof, and the injury sustained by the prevailing party, by reason of the taking or detention thereof, and the Trial Justice shall render judgment accordingly, with costs and disbursements.

If it shall appear by the return of a Constable that he has taken the property described in the Plaintiff's affidavit, and that Defendant cannot be found, and has no last place of abode in said County, or that no agent

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of Defendant could be found on whom service could be made, the Trial Justice may proceed with the cause in the same manner as though there had been a personal service.

For the indorsement on said affidavit the Trial Justice shall receive an additional fee of twenty-five cents, which shall be included in the costs of the suit.

No jurisdiction in certain cases.

SEC. 81. But no Trial Justice shall have cognizance of a civil action: 1. In which the State is a party, excepting for penalties not exceeding one hundred dollars.

2. Nor where the title to real property shall come in question.

3. Nor of a civil action for an assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction; where the damages claimed exceed one hundred dollars.

4. Nor of an action against an executor or administrator as such.

Answer of title.

SEC. 82. In every action brought in a Court of Trial Justice, where the title to real property shall come in question, the Defendant may, either with or without other matter of defence, set forth in his answer any matter showing that such title will come in question. Such answer shall be in writing, signed by the Defendant or his attorney, and delivered to the Trial Justice. The Trial Justice shall thereupon countersign the same, and deliver it to the Plaintiff.

Written undertaking to be given.

SEC. 83. At the time of answering the Defendant shall deliver to the Trial Justice a written undertaking, executed by at least one sufficient surety, and approved by the Trial Justice, to the effect that if the Plaintiff shall, within twenty days thereafter, deposit with the Trial Justice a summons and complaint in an action in the Circuit Court for the same cause, the Defendant will, within twenty days after such deposit, give an admission in writing of the service thereof.

Where the defendant was arrested in the action before the Trial Justice, the undertaking shall further provide, that he will, at all times, render himself amenable to the process of the Court during the pending of the action, and to such as may be issued to enforce the judgment therein. In case of failure to comply with the undertaking, the surety shall be liable not exceeding one hundred dollars.

Action discontinued. Costs.

SEC. 84. Upon the delivery of the undertaking to the Trial Justice, the action before him shall be discontinued, and each party shall pay his own costs. The costs so paid by either party shall be allowed to him if he recover costs in the action to be brought for the same cause in the Supreme Court. If no such action be brought within thirty days after the delivery of the undertaking, the defendant's costs before the Trial Justice may be recovered of the plaintiff.

If undertaking not given.

SEC. 85. If the undertaking be not delivered to the Trial Justice, he shall have jurisdiction of the cause, and shall proceed therein; and the defendant shall be precluded, in his defence, from drawing the title in question.

The same.

SEC. 86. If, however, it appear on the trial, from the plaintiff's own showing, that the title to real property is in question, and such title shall be disputed by the defendant, the Trial Justice shall dismiss the action and render judgment against the plaintiff for the costs.

Another action may be brought.

SEC. 87. When a suit before a Trial Justice shall be discontinued by the delivery of an answer and undertaking, as provided in Sections eighty-two, eighty-three, eighty-four, the plaintiff may prosecute an action for

the same cause in the Circuit Court, and shall complain for the same cause of action only on which he relied before the Trial Justice; and the answer of the defendant shall set up the same defence only which he made before the Trial Justice.

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SEC. 88. If the judgment in the Circuit Court be for the plaintiff, he shall recover costs; if it be for the defendant, he shall recover costs, except that upon a verdict he shall pay costs to the plaintiff, unless the Judge certify that the title to real property came in question on the trial.

Costs.

SEC. 89. If, in an action before a Trial Justice, the plaintiff have several causes of action, to one of which the defence of title to real property shall be interposed, and as to such cause the defendant shall deliver and answer an undertaking, as provided in Sections eighty-two and eighty-three, and the Trial Justice shall discontinue the proceedings as to that cause, and the plaintiff may commence another action therefor in the Circuit Court. As to the other causes of action, the Trial Justice may continue his proceedings.

Answer of title as to one cause of action. Transfer of cases to Circuit Court.

SEC. 90. A Trial Justice, on the demand of a party in whose favor he shall have rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the Clerk of the County where the judgment was rendered. The time of the receipt of the transcript by the Clerk shall be noted thereon and entered in the docket; and from that time the judgment shall be a judgment of the County Court. A certified transcript of such judgment may be filed and docketed in the Clerk's office of any other County, and with the like effect, in every respect, as in the County where the judgment was rendered. But no such judgment for a less sum than twenty-five dollars, exclusive of costs, shall be so docketed or enforced against real property.

Docketing judgment of Justices.

SEC. 91. The following rules shall be observed in the Courts of Trial Justices:

Rules.

1. The pleadings in these Courts are: 1. The complaint by the plaintiff;
2. The answer by the defendant.
2. The pleadings may be oral or in writing; if oral, the substance of them shall be entered by the Trial Justice in his docket; if in writing, they shall be filed by him, and a reference to them shall be made in the docket.
3. The complaint shall state, in a plain and direct manner, the facts constituting the cause of action.
4. The answer may contain a denial of the complaint, or any part thereof, and also a notice, in a plain and direct manner, of any facts constituting a defence or counter claim.
5. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended.
6. Either party may demur to a pleading of his adversary, or any part thereof, when it is not sufficiently explicit to enable him to understand it, or it contains no cause of action or defence, although it be taken as true.
7. If the Court deem the objection well founded, it shall order the pleading to be amended; and if the party refuse to amend, the defective pleading shall be disregarded.

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8. In case a defendant does not appear and answer, the plaintiff cannot recover without proving his case.

9. In an action or defence founded upon an account, or an instrument for the payment of money only, it shall be sufficient for a party to deliver the account or instrument to the Court, and to state that there is due to him thereon, from the adverse party, a specified sum, which he claims to recover or set off.

10. A variance between the proof on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the Court shall be satisfied that the adverse party has been misled to his prejudice thereby.

11. The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, when, by such amendment, substantial justice will be promoted. If the amendment be made after the joining of the issue, and it be made to appear to the satisfaction of the Court, by oath, that an adjournment is necessary to the adverse party, in consequence of such amendment, an adjournment shall be granted. The Court may also, in its discretion, require, as a condition of an amendment, the payment of costs to the adverse party.

12. Execution may be issued on a judgment, heretofore or hereafter rendered in Trial Justice's Court, at any time within five years after the rendition thereof, and shall be returnable sixty days from the date of the same.

13. If the judgment be docketed with the Clerk of the Circuit Court, the execution shall be issued by him to the Sheriff of the County, and have the same effect, and be executed in the same manner, as other executions and judgments of the Circuit Court.

14. The Court may, at the joining of the issue, require either party, at the request of the other, at that or some other specified time, to exhibit his account, or state the nature thereof, as far forth as may be in his power, and, in case of his default, preclude him from giving evidence of such parts thereof as shall not have been so exhibited or stated.

15. The provisions of this Act respecting forms of action, parties to actions, the rules of evidence, the times of commencing actions, and the service of process upon corporations, shall apply to these Courts.

The defendant may, on the return of process, and before answering, make an offer in writing to allow judgment to be taken against him for an amount, to be stated in such offer, with costs. The plaintiff shall thereupon, and before any other proceedings shall be had in the action, determine whether he will accept or reject such offer. If he accept the offer, and give notice thereof in writing, the Trial Justice shall file the offer and the acceptance thereof, and render judgment accordingly. If notice of acceptance be not given, and if the Plaintiff fail to obtain judgment for a greater amount, exclusive of costs, than has been specified in the offer, he shall not recover costs, but shall pay to the Defendant his costs accruing subsequent to the offer.

PART II.

OF CIVIL ACTIONS.

TITLE I. Of their form.

- II. Of the time of commencing them.
- III. Of the parties.
- IV. Of the place of trial.
- V. Of the manner of commencing them.
- VI. Of the pleadings.
- VII. Of the provisional remedies.
- VIII. Of the trial and judgment.
- IX. Of the execution of the judgment.
- X. Of the costs.
- XI. Of appeals.
- XII. Of the miscellaneous proceedings.
- XIII. Actions in particular cases.
- XIV. Provisions relating to existing suits.
- XV. General provisions.

TITLE I.

FORM OF CIVIL ACTIONS.

SEC. 92. Distinction between actions at law and suits in equity abolished.

93. Parties, how designated.

94. Actions on Judgments.

95. Feigned issues abolished.

SEC. 92. The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and there shall be in this State, hereafter, but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action. Distinction between actions at law and suits in equity abolished.

SEC. 93. In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant. Parties, how designated.

SEC. 94. No action shall be brought upon a judgment rendered in any Court in this State, except a Court of Trial Justice, between the same parties, without leave of the Court, for good cause shown, on notice to the adverse party; and no action on a judgment rendered by a Trial Justice shall be brought in the same County within five years after its rendition, except in case of his death, resignation, incapacity to act, or removal from the County, or that the process was not personally served on the defendant, or on all the defendants, or in case of the death of some of the parties, or where the docket or record of such judgment is or shall have been lost or destroyed. Actions on judgments.

SEC. 95. Feigned issues are abolished; and instead thereof, in the cases where the power now exists to order a feigned issue, or when a question Feigned issues abolished.

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of fact, not put in issue by the pleadings, is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial.

TITLE II.

TIME OF COMMENCING CIVIL ACTIONS.

CHAPTER I. Actions generally.

II. For the recovery of real property.

III. Other than for the recovery of real property.

IV. General provisions.

CHAPTER I.

SEC. 96. Repeal of existing limitations.

97. Time for commencing actions, etc.

SEC. 96. The provisions of this title shall not extend to actions already commenced, or to cases where the right of action has already accrued; but the statutes now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form.

Limitations
existing re-
pealed.

SEC. 97. Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute, and in the cases mentioned in Section ninety-six.

Period of
limitation, an-
swer, &c.

But the objection that the action was not commenced within the time limited can only be taken by answer.

CHAPTER II.

SEC. 98. When the State will not sue.

99. When action cannot be brought by grantee from the State.

100. When action by the State or their grantees to be brought within twenty years.

101. Seizin within twenty years, when necessary.

102. Seizin within twenty years, when necessary in action or defence founded on title, &c.

103. Action after entry, or right of entry.

104. Possession, when presumed. Occupation, when deemed under legal title.

105. Occupation under written instrument, &c.

106. Adverse possession under written instrument, &c.

107. Premises actually occupied, held adversely.

108. Adverse possession under claim of title not written.

109. Relation of landlord and tenant, as affecting adverse possession.

110. Descent cast—effect of.

111. Persons under disability.

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When the State will not sue.

No action to be brought by grantee from the State.

When actions by the State or its grantees to be brought within twenty years.

Seizin within twenty years when necessary.

Seizin within twenty years when in action or defence founded on title.

Action after entry or right of entry.

Possession presumed.

Occupation, when deemed under legal title.

Occupation under written instrument.

SEC. 98. The State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the State to the same, unless:

1. Such right or title shall have accrued within forty years before any action or other proceeding for the same shall be commenced; or unless,

2. The State, or those from whom it claims, shall have received the rents and profits of such real property, or of some part thereof, within the space of forty years.

SEC. 99. No action shall be brought for, or in respect to, real property, by any person claiming by virtue of letters patent or grants from the State, unless the same might have been commenced by the State as herein specified, in case such patent or grant had not been issued or made.

SEC. 100. When letters patent or grants of real property shall have been issued or made by the State, and the same shall be declared void by the determination of a competent Court, rendered upon an allegation of a fraudulent suggestion, or concealment, or forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title, in such case an action for the recovery of the premises so conveyed may be brought either by the State, or by any subsequent patentee or grantee of the premises, his heirs or assigns, within twenty years after such determination was made, but not after that period.

SEC. 101. No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within twenty years before the commencement of such action.

SEC. 102. No cause of action, or defence to an action, founded upon the title to real property, or to rents or services out of the same, shall be effectual, unless it appear that the person prosecuting the action or making the defence, or under whose title the action is prosecuted or the defence is made, or the ancestor, predecessor or grantor of such person, was seized or possessed of the premises in question within twenty years before the committing of the act in respect to which such action is prosecuted or defence made.

SEC. 103. No entry upon real estate shall be deemed sufficient or valid, as a claim, unless an action be commenced thereupon within one year after the making of such entry, and within twenty years from the time when the right to make such entry descended or accrued.

SEC. 104. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for twenty years before the commencement of such action.

SEC. 105. Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent Court, and that there has been a continued occupation and possession of the premises included in such instru-

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ment, decree or judgment, or of some part of such premises, under such claim, for twenty years, the premises so included shall be deemed to have been held adversely; except that where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

Adverse possession.

SEC. 106. For the purpose of constituting an adverse possession, by any person claiming a title founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved;
2. Where it has been protected by a substantial inclosure;
3. Where, although not inclosed, it has been used for the supply of fuel or of fencing timber, for the purposes of husbandry or the ordinary use of the occupant;
4. Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

Premises actually occupied held adversely.

SEC. 107. Where it shall appear that there has been an actual continued occupation of premises, under a claim of title, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely.

Adverse possession under a claim not written.

SEC. 108. For the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only:

- Where it has been protected by a substantial inclosure;
Where it has been usually cultivated or improved.

Relation of landlord and tenant.

SEC. 109. Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or, where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

Descent cast.

SEC. 110. The right of a person to the possession of any real property shall not be impaired or affected by a descent being cast in consequence of the death of a person in possession of such property.

Persons under disabilities.

SEC. 111. If a person entitled to commence any action for the recovery of real property, or to make an entry or defence founded on the title to real property, or to rents or services out of the same, be, at the time such title shall first descend or accrue, either—

1. Within the age of twenty-one years; or,
2. Insane; or,
3. Imprisonment on a criminal charge, or in execution upon conviction of a criminal offence for a term less than for life; the time during which such disability shall continue shall not be deemed any portion of the time in this chapter limited for the commencement of such action or the making of such entry or defence; but such action may be commenced, or

entry or defence made, after the period of twenty years, and within ten years after the disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced, or entry or defence made, after that period.

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CHAPTER III.

TIME OF COMMENCING ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY.

SEC. 112. Limitation prescribed.

113. Twenty years.

114. Six years.

115. Three years.

116. Two years.

117. One year.

118. Action upon a current account.

119. Action for penalties.

120. Action for other relief.

121. Action by the people.

SEC. 112. The periods prescribed in Section ninety-seven for the commencement of actions other than for the recovery of real property shall be as follows: Period of limitation prescribed.

SEC. 113. Within twenty years:

1. An action upon a judgment or decree of any Court of the United States, or of any State or Territory within the United States. Twenty years.

2. An action upon a sealed instrument.

SEC. 114. Within six years: Six years.

1. An action upon a contract obligation or liability, express or implied, excepting those mentioned in Section one hundred and thirteen.

2. An action upon a liability created by statute, other than a penalty or forfeiture.

3. An action for trespass upon real property.

4. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.

5. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.

6. An action for relief on the ground of fraud, in cases which heretofore were solely cognizable by the Court of Chancery, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

SEC. 115. Within three years: Three years.

1. An action against a Sheriff, Coroner or Constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this Section shall not apply to an action for an escape.

2. An action upon a statute, for a penalty or forfeiture, where the

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action is given to the party aggrieved, or to such party and the State, except where the statute imposing it prescribes a different limitation.

Two years.

SEC. 116. Within two years :

1. An action for libel, slander, assault, battery or false imprisonment.
2. An action upon a statute, for a forfeiture or penalty to the State.

One year.

SEC. 117. Within one year :

1. An action against a Sheriff or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

Action upon
a current ac-
count.

SEC. 118. In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

Action for
penalties, &c.

SEC. 119. An action upon a statute, for a penalty or forfeiture given, in whole or in part, to any person who will prosecute for the same, must be commenced within one year after the commission of the offence ; and if the action be not commenced within the year by a private party, it may be commenced within two years thereafter, in behalf of the State, by the Attorney-General or the Solicitor of the Circuit where the offence was committed.

Actions for
other relief.

SEC. 120. An action for relief not hereinbefore provided for must be commenced within ten years after the cause of action shall have accrued.

Actions by
the State.

SEC. 121. The limitations prescribed in this chapter shall apply to actions brought in the name of the State, or for its benefit, in the same manner as to actions by private parties.

CHAPTER IV.

GENERAL PROVISIONS AS TO THE TIME OF COMMENCING ACTIONS.

SEC. 122. When action deemed commenced.

123. Exception, defendant out of State.
124. Exception as to person under disabilities.
125. Death of person entitled before limitation expires.
126. Suits by aliens.
127. Where judgment reversed.
128. Stay of action by injunction, &c.
129. Disability must exist when right accrued.
130. Two or more disabilities.
131. This title, when not to apply.
132. The like.
133. New promise must be in writing.

When action
deemed com-
menced.

SEC. 122. An action is commenced as to each defendant when the summons is served on him, or on a co-defendant, who is a joint contractor, or otherwise united in interest with him. An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this title, when the summons is delivered, with the intent that it shall be actually served, to the Sheriff or other officer of the County in which the defendants or one of them usually or last resided ; or, if a corpora-

tion be defendant, to the Sheriff or other officer of the County in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business.

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SEC. 123. If, when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced within the terms herein respectively limited, after the return of such person into this State; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this State, or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

Exception, defendant out of State.

SEC. 124. If a person entitled to bring an action mentioned in the last chapter, except for a penalty or forfeiture, or against a Sheriff or other officer, for an escape, be at the time the cause of action accrued, either,

Exceptions, persons under disabilities.

1. Within the age of twenty-one years; or,

2. Insane; or,

3. Imprisoned on a criminal charge; or, in execution under the sentence of a criminal Court, for a term less than his natural life; the time of such disability is not a part of the time limited for the commencement of the action; except that the period within which the action must be brought cannot be extended more than five years by any such disability, except infancy; nor can it be so extended in any case longer than one year after the disability ceases.

SEC. 125. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his executors or administrator after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

Death of person entitled before limitation expires.

SEC. 126. When a person shall be an alien subject or citizen of a country at war with the United States, the time of the continuance of the war shall not be part of the period limited for the commencement of the action.

Action of aliens.

SEC. 127. If an action shall be commenced within the time prescribed therefor, and a judgment therein be reversed on appeal, the plaintiff, or, if he die and the cause of action survive, his heirs or representatives, may commence a new action within one year after the reversal.

Where judgment reversed.

SEC. 128. When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action.

Time of stay by injunction, &c.

SEC. 129. No person shall avail himself of a disability, unless it existed when his right of action accrued.

Disability—not available.

SEC. 130. When two or more disabilities shall co-exist at the time the right of action accrues, the limitation shall not attach until they all be removed.

Co-existing disabilities.

SEC. 131. This title shall not affect actions to enforce the payment of &c.

Bills, notes, &c.

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This title not to affect actions against Directors or Stockholders.

Acknowledgment or new promise must be made in writing.

bills, notes, or other evidences of debt, issued by moneyed corporations, or issued or put in circulation as money.

SEC. 132. This title shall not affect actions against Directors or stockholders of a moneyed corporation, or banking associations, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created.

SEC. 133. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but this Section shall not alter the effect of any payment of principal or interest.

TITLE III.

PARTIES TO CIVIL ACTIONS.

SEC. 134. Party in interest to sue. Action by grantee of land held adversely.

135. Assignment of thing in action.

136. Actions by executor, trustee, &c.

137. Actions by and against married women.

138. Infants, actions by and against.

139. Guardian, how appointed.

140. Who may be plaintiffs.

141. Who may be defendants.

142. One or more may sue or defend for all.

143. One action against the different parties to bills and notes.

144. Action, when not to abate.

145. Court to decide controversy, &c. Interpleading.

Action to be by party in interest. Action by grantee of land held adversely.

SEC. 134. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in Section one hundred and thirty-six; but this Section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. But an action may be maintained by a grantee of land in the name of the grantor, or his or her heirs or legal representatives, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision.

Assignment of a thing in action.

SEC. 135. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defence existing at the time of, or before notice of, the assignment; but this Section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due.

Action by executor, trustee, &c.

SEC. 136. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trus-

tee of an express trust, within the meaning of this Section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.

SEC. 137. When a married woman is a party, her husband must be joined with her, except that,

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Action by and against a married woman.

1. When the action concerns her separate property, she may sue or be sued alone: Provided, That neither her husband nor his property shall be liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole.

2. When the action is between herself and her husband, she may sue or be sued alone; and in no case need she prosecute or defend by a guardian or next friend.

SEC. 138. When an infant is a party, he must appear by guardian, who may be appointed by the Court in which the action is prosecuted, or by a Judge thereof, or a Probate Judge.

Infant to appear by guardian.

SEC. 139. The guardian shall be appointed as follows:

Appointment of guardian.

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years; or, if under that age, upon the application of his general or testamentary guardian, if he has any, or of a relative or friend of the infant; if made by a relative or friend of an infant, notice thereof must first be given to such guardian, if he has one; if he has none, then to the person with whom such infant resides.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after service of the summons. If he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one within this State; if he has none, then to the infant himself, if over fourteen years of age, and within the State; or, if under that age, and within the State, to the person with whom such infant resides. And in actions for the partition of real property, or for the foreclosure of a mortgage or other instrument, when an infant defendant resides out of this State, or is temporarily absent therefrom, the plaintiff may apply to the Court in which the action is pending, at any stated or special term thereof, and will be entitled to an order designating some suitable person to be the guardian for the infant defendant, for the purposes of the action, unless the infant defendant, or some one in his behalf, within a number of days after the service of a copy of the order, which number of days shall be in the said order specified, shall procure to be appointed a guardian for the said infant, and the Court shall give special directions in the order for the manner of the service thereof, which may be upon the infant.

And in case an infant-defendant having an interest in the event of the action shall reside in any State with which there shall not be a regular communication by mail, on such fact satisfactorily appearing to the Court, the Court may appoint a guardian *ad litem* for such absent infant party, for the purpose of protecting the right of such infant in said action, and on such guardian *ad litem* process, pleadings and notices in the action may be served in the like manner as upon a party residing in this State.

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Who to be
plaintiffs.Who to be
defendant.Parties to be
joined, &c.Of existing
suits. Action
when not to
abate.Court may
determine a
controversy,
&c.

SEC. 140. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title.

SEC. 141. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein; and in an action to recover the possession of real estate, the landlord and tenant thereof may be joined as defendants; and any person claiming title or a right of possession to real estate may be made parties plaintiff or defendant, as the case may require, to any such actions.

SEC. 142. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the Court, one or more may sue or defend for the benefit of the whole.

SEC. 143. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action, at the option of the plaintiff.

SEC. 144. No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage, or other disability of a party, the Court, on motion, at any time within one year thereafter, or afterwards, on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the Court may allow the person to whom the transfer is made to be substituted in the action.

After a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action now survives by law.

At any time after the death, marriage, or other disability of the party plaintiff, the Court in which an action is pending, upon notice to such persons as it may direct, and upon application of any person aggrieved, may, in its discretion, order that the action be deemed abated, unless the same be continued by the proper parties, within a time to be fixed by the Court, not less than six months nor exceeding one year from the granting of the order.

SEC. 145. The Court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the Court must cause them to be brought in. And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the Court to be made a party, it may order him to be brought in by the proper amendment.

A defendant against whom an action is pending upon a contract, or for specific, real, or personal property, may at any time before answer, upon affidavit that a person not a party to the action, and without collusion by him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the Court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in Court the amount of the debt, or delivering the property or its value to such person as the Court may direct; and the Court may, in its discretion, make the order.

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Interpleader.

TITLE IV.

OF THE PLACE OF TRIAL OF CIVIL ACTIONS.

SEC. 146. Actions to be tried where subject-matter situated.

147. Actions to be tried where cause of action arose.

148. Actions to be tried where the parties reside.

149. Changing place of trial.

SEC. 146. Actions for the following causes must be tried in the County in which the subject of the action, or some part thereof, is situated, subject to the power of the Court to change the place of trial, in the cases provided by statute:

Actions to be tried where subject-matter situated.

1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property;

2. For the partition of real property;

3. For the foreclosure of a mortgage of real property;

4. For the recovery of personal property distrained for any cause.

SEC. 147. Actions for the following causes must be tried in the County where the cause, or some part thereof, arose, subject to the like power of the Court to change the place of trial, in the cases provided by statute:

Action to be tried where cause of action arose.

1. For the recovery of a penalty or forfeiture imposed by statute, except that, when it is imposed for an offence committed on a lake, river, or other stream of water, situated in two or more Counties, the action may be brought in any County bordering on such lake, river, or stream, and opposite to the place where the offence was committed;

2. Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, shall do anything touching the duties of such officer.

SEC. 148. In all other cases the action shall be tried in the County in which the parties, or any of them, shall reside at the commencement of the action; or, if none of the parties shall reside in the State, the same may be tried in any County which the plaintiff shall designate in his complaint, subject, however, to the power of the Court to change the place of trial, in the cases provided by statute.

Action to be tried where parties reside

SEC. 149. If the County designated for that purpose in the complaint be not the proper County, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expire, de-

Change of place of trial.

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mand, in writing, that the trial be had in the proper County, and the place of trial be thereupon changed by consent of parties, or by order of the Court, as is provided in this Section.

The Court may change the place of trial in the following cases:

1. When the County designated for that purpose in the complaint is not the proper County;
2. When there is reason to believe that an impartial trial cannot be had therein;
3. When the convenience of witnesses and the ends of justice would be promoted by the change.

When the place of trial is changed, all other proceedings shall be had in the County to which the place of trial is changed, unless otherwise provided by the consent of the parties, in writing, duly filed, or order of the Court; and the papers shall be filed or transferred accordingly.

TITLE V.

MANNER OF COMMENCING CIVIL ACTIONS.

SEC. 150. Actions, how commenced.

151. Summons, requisites of.
152. Notice to be inserted in summons.
153. Complaint need not be served with summons.
154. Defendant unreasonably defending.
155. Notice of lis pendens.
156. Service of summons.
157. Return of summons.
158. Publication of summons.
159. Proceedings when part only of defendants served—partners.
160. When service by publication complete.
161. Proof of service.
162. When jurisdiction of action acquired.

Action, how commenced.

SEC. 150. Civil actions in the Courts of Record of this State shall be commenced by service of a summons.

Summons—requisites of.

SEC. 151. The summons shall be subscribed by the plaintiff or his attorney, and directed to the defendant, and shall require him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the State, to be therein specified, in which there is a post office, within twenty days after the service of the summons, exclusive of the day of service.

Summons—notice to be inserted in.

SEC. 152. The plaintiff shall also insert in the summons a notice, in substance as follows:

1. In an action arising on contract, for the recovery of money only, that he will take judgment for a sum specified therein, if the defendant fail to answer the complaint in twenty days after the service of the summons.
2. In other actions, that if the defendant shall fail to answer the complaint within twenty days after the service of the summons, the plaintiff will apply to the Court for the relief demanded in the complaint.

SEC. 153. A copy of the complaint need not be served with the summons. In such case, the summons must state where the complaint is or will be filed; and if the defendant, within twenty days thereafter, causes notice of appearance to be given, and, in person or by attorney, demands, in writing, a copy of the complaint, specifying a place within the State where it may be served, a copy thereof must, within twenty days thereafter, be served accordingly; and after such service, the defendant has twenty days to answer; but only one copy need be served on the same attorney.

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Service of
complaint.

SEC. 154. In the case of a defendant against whom no personal claim is made, the plaintiff may deliver to such defendant, with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific real or personal property, and that no personal claim is made against such defendant, in which case no copy of the complaint need be served on such defendant, unless, within the time for answering, he shall, in writing, demand the same. If a defendant on whom such notice is served unreasonably defend the action, he shall pay costs to the plaintiff.

Notice of
no personal
claim.

SEC. 155. In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, or at any time afterwards, or whenever a warrant of attachment, under chapter four of title seven, part second, of this Code, shall be issued, or at any time afterwards, the plaintiff, or a defendant, when he sets up an affirmative cause of action in his answer and demands substantive relief, at the time of filing his answer, or at any time afterwards, if the same be intended to affect real estate, may file with the Clerk of each County in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that County affected thereby; and if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the date of the mortgage, the parties thereto, and the time and place of recording the same. From the time of filing only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or incumbrancer, and shall be bound, by all proceedings taken after the filing of such notice, to the same extent as if he were made a party to the action. For the purposes of this Section, an action shall be deemed to be pending from the time of filing such notice: Provided, however, That such notice shall be of no avail, unless it shall be followed by the first publication of the summons, or an order therefor, or by the personal service thereof on a defendant within sixty days after such filing. And the Court in which the said action was commenced may, in its discretion, at any time after the action shall be settled, discontinued or abated, as is provided in Section number one hundred and forty-four, on application of any person aggrieved, and on good cause shown, and on such notice as shall be directed or approved by the Court, order the notice authorized by this Section to be cancelled of record by the Clerk of any County in whose office the same may have been filed or recorded; and such cancellation shall be made by an indorsement to that

Notice of lis
pendens.

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Summons—
by whom served.

effect on the margin of the record, which shall refer to the order, and for which the Clerk shall be entitled to a fee of twenty-five cents.

SEC. 156. The summons may be served by the Sheriff of the County where the defendant may be found, or by any other person not a party to the action. The service shall be made, and the summons returned, with proof of the service, to the person whose name is subscribed thereto, with all reasonable diligence. The person subscribing the summons may, at his option, by an endorsement on the summons, fix a time for the service thereof, and the service shall then be made accordingly.

Service of
summons.

SEC. 157. The summons shall be served by delivering a copy thereof as follows:

1. If the suit be against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, a director, or managing agent thereof; but such service can be made in respect to a foreign corporation only when it has property within this State, or the cause of action arose therein, or where such service shall be made within this State personally upon the president, cashier, treasurer, or secretary thereof.

2. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother or guardian; or, if there be none within the State, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed.

3. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee or guardian has been appointed, to such committee or guardian and to the defendant personally.

4. In all other cases, to the defendant personally.

Service by
publication.

SEC. 158. Where the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State, and that fact appears by affidavit to the satisfaction of the Court or a Judge thereof, or of the Probate Judge of the County where the trial is to be had, and it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a proper party to an action relating to real property in this State, such Court or Judge may grant an order that the service be made by the publication of a summons in either of the following cases:

1. Where the defendant is a foreign corporation, has property within the State, or the cause of action arose therein;

2. Where the defendant, being a resident of this State, has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent;

3. Where he is not a resident of this State, but has property therein, and the Court has jurisdiction of the subject of the action;

4. Where the subject of the action is real or personal property in this State, and the Defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists, wholly or partly, in excluding the Defendant from any interest or lien therein;

5. Where the action is for divorce, in the cases prescribed by law.

The order must direct the publication to be made in two newspapers, to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, not less than once a week for six weeks. In case of publication, the Court or Judge

must also direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence, unless it appear that such residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint, out of the State, is equivalent to publication and deposit in the post office.

The Defendant against whom publication is ordered, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce, the Defendant against whom publication is ordered, or his representatives, may, in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just; and if the defence be successful, and the judgment or any part thereof have been collected, or otherwise enforced, such restitution may thereupon be compelled as the Court directs; but the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected. And in all cases where publication is made, the complaint must be first filed, and the summons, as published, must state the time and place of such filing.

In actions for the foreclosure of mortgages on real estate, already instituted, or hereafter to be instituted, if any party or parties having any interest in or lien upon such mortgaged premises are unknown to the Plaintiff, and the residence of such party or parties cannot, with reasonable diligence, be ascertained by him, and such fact shall be made to appear, by affidavit, to the Court, or to a Judge thereof, where the trial is to be had, such Court or Judge may grant an order that the summons be served on such unknown party or parties by publishing the same for six weeks, once in each week successively, in a newspaper printed in the County where the premises are situated, which publication shall be equivalent to a personal service on such unknown party or parties.

SEC. 159. Where the action is against two or more Defendants, and the summons is served on one or more of them, but not on all of them, the Plaintiff may proceed as follows:

Joint and several debtors —partners.

1. If the action be against Defendants jointly indebted upon contract, he may proceed against the Defendant served, unless the Court otherwise direct; and if he recover judgment, it may be entered against all the Defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the Defendants served, and, if they are subject to arrest, against the persons of the Defendants served; or,

2. If the action be against Defendants severally liable, he may proceed against the Defendants served in the same manner as if they were the only Defendants.

3. If all the Defendants have been served, judgment may be taken against any or either of them severally, where the Plaintiff would be entitled to judgment against such Defendant or Defendants, if the action had been against them or any of them alone.

4. If the name of one or more partners shall, for any cause, have been omitted in any action in which judgment shall have passed against the Defendants named in the summons, and such omission shall not have

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been pleaded in such action, the Plaintiff, in case the judgment therein shall remain unsatisfied, may by action recover of such partner separately, upon proving his joint liability, notwithstanding he may not have been named in the original action; but the Plaintiff shall have satisfaction of only one judgment rendered for the same cause of action.

When service complete.

SEC. 160. In the cases mentioned in Section one hundred and fifty-eight, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication.

Proof of service.

SEC. 161. Proof of the service of the summons, and of the complaint or notice, if any, accompanying the same, must be as follows:

1. If served by the Sheriff, his certificate thereof; or,

2. If by any other person, his affidavit thereof; or,

3. In case of publication, the affidavit of the printer, or his foreman, or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post office, as required by law, if the same shall have been deposited; or,

4. The written admission of the Defendant.

In case of service otherwise than by publication, the certificate, affidavit or admission must state the time and place of the service.

Jurisdiction.

SEC. 162. From the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the Court is deemed to have acquired jurisdiction, and to have control of all the subsequent

Appearance.

proceedings. A voluntary appearance of a Defendant is equivalent to personal service of the summons upon him.

TITLE VI.

OF THE PLEADINGS IN CIVIL ACTIONS.

CHAPTER I. The complaint.

II. The demurrer.

III. The answer.

IV. The reply.

V. General rules of pleading.

VI. Mistakes and amendments.

CHAPTER I.

THE COMPLAINT.

SEC. 163. Forms of pleading.

164. Complaint.

165. Complaint, what to contain.

Of forms of pleading.

SEC. 163. All the forms of pleading heretofore existing are abolished; and, hereafter, the forms of pleading in civil actions in Courts of Record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this Act.

SEC. 164. The first pleading on the part of the Plaintiff is the complaint.

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Complaint.

SEC. 165. The complaint shall contain:

1. The title of the cause, specifying the name of the Court in which the action is brought, the name of the County in which the Plaintiff desires the trial to be had, and the names of the parties to the action—Plaintiff and Defendant.

Complaint—
what to contain.

2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition.

3. A demand of the relief to which the Plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated.

CHAPTER II.

THE DEMURRER.

SEC. 166. Defendant to demur or answer.

167. When the defendant may demur.

168. Demurrer, what to specify.

169. How to proceed if complaint be amended.

170. Objection not appearing on complaint.

171. Objection, when waived.

SEC. 166. The only pleading on the part of the defendant is either a demurrer or an answer. It must be served within twenty days after the service of the copy of the complaint.

Defendant to
demur or an-
swer.

SEC. 167. The defendant may demur to the complaint when it shall appear upon the face thereof, either—

When defend-
ant may de-
mur.

1. That the Court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties, for the same cause; or,

4. That there is a defect of parties, plaintiff or defendant; or,

5. That several causes of action have been improperly united; or,

6. That the complaint does not state facts sufficient to constitute a cause of action.

SEC. 168. The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be disregarded. It may be taken to the whole complaint or to any of the alleged causes of action stated therein.

The Demur-
rer must spec-
ify grounds
of objection.

SEC. 169. If the complaint be amended, a copy thereof must be served on the defendant, who must answer it within twenty days, or the plaintiff, upon filing with the Clerk, on due proof of the service, and of the defendant's omission, may proceed to obtain judgment, as provided by Section two hundred and sixty-nine; but where an application to the Court for judgment is necessary, eight days' notice thereof must be given to the defendant.

How to pro-
ceed if com-
plaint amend-
ed.

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Objection not
appearing on
complaint.

Objection—
when deemed
waived.

SEC. 170. When any of the matters enumerated in Section one hundred and sixty-seven do not appear upon the face of the complaint, the objection may be taken by answer.

SEC. 171. If no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

CHAPTER III.

THE ANSWER.

SEC. 172. Answer, what to contain.

173. Counter claim. Several defences.

174. Demurrer and answer, when allowed.

175. Sham and irrelevant defences to be stricken out.

Answer, what
to contain.

SEC. 172. The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defence or counter claim, in ordinary and concise language, without repetition.

Counter
claim. Several
defences.

SEC. 173. The counter claim mentioned in the last Section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the Plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

The Defendant may set forth by answer as many defences and counter claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.

Demurrer
and answer.

SEC. 174. The Defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue.

Sham and
irrelevant de-
fences to be
stricken out.

SEC. 175. Sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the Court may, in their discretion, impose.

CHAPTER IV.

THE REPLY.

SEC. 176. Reply. Demurrer to answer.

177. Motion for judgment upon answer.

178. Demurrer to reply.

SEC. 176. When the answer contains new matter constituting a counter claim, the Plaintiff may, within twenty days, reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defence to such new matter in the answer; and the Plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a counter claim or defence; and the Plaintiff may demur to one or more of such defences or counter claims, and reply to the residue of the counter claims.

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Reply.

Demurrer to answer.

And in other cases, where an answer contains new matter constituting a defence by way of avoidance, the Court may, in its discretion, on the Defendant's motion, require a reply to such new matter; and in that case the reply shall be subject to the same rules as a reply to a counter claim.

SEC. 177. If the answer contain a statement of new matter constituting a counter claim, and the Plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement; and if the case require it, a writ of inquiry of damages may be issued.

Motion for judgment on answer.

SEC. 178. If a reply of the Plaintiff to any defence set up by the answer of the Defendant be insufficient, the Defendant may demur thereto, and shall state the grounds thereof.

Demurrer to reply.

CHAPTER V.

GENERAL RULES OF PLEADING.

SEC. 179. Pleadings to be subscribed and verified.

180. Pleadings, how verified.

181. How to state an account in pleading.

182. Pleadings to be liberally construed.

183. Irrelevant or redundant matter to be stricken out, and indefinite matter made more definite.

184. Judgment, how to be pleaded.

185. Conditions precedent, how to be pleaded.

186. Private statutes, how to be pleaded.

187. Libel and slander, how stated in complaint.

188. Answer in such cases.

189. Answer in actions to recover property distrained for damage.

190. What causes of action may be joined.

191. Allegation not denied, when to be deemed true.

SEC. 179. Every pleading in a Court of Record must be subscribed by the party or his attorney; and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also.

Pleadings, to be subscribed and verified.

SEC. 180. The verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters

Pleadings—how verified.

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stated on information and belief, and, as to those matters, he believes it to be true; and must be by the affidavit of the party, or, if there be several parties united in interest, and pleading together, by one at least of such parties acquainted with the facts, if such party be within the County where the attorney resides, and capable of making the affidavit. The affidavit may also be made by the agent or attorney, if the action or defence be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party. When a corporation is a party, the verification may be made by any officer thereof; and when the State, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts. The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. And no pleading can be used in a criminal prosecution against the party, as a proof of a fact admitted or alleged in such pleading: Provided, That the verification of any pleading in any Court of Record in this State may be omitted in all cases where the party called upon to verify would be privileged from testifying as a witness to the truth of any matter denied by such pleading.

Items of account. Particulars.

SEC. 181. It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged; but he shall deliver to the adverse party, within ten days after a demand therefor in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The Court, or a Judge thereof, may order a "further account," when the one delivered is defective; and the Court may, in all cases, order a bill of particulars of the claim of either party to be furnished.

Pleadings—how to be construed.

SEC. 182. In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties.

Irrelevant or redundant. Indefinite or uncertain.

SEC. 183. If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the Court may require the pleading to be made definite and certain by amendment.

Judgments—how impleaded.

SEC. 184. In pleading a judgment, or other determination of a Court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction.

Conditions precedent—how pleaded.

SEC. 185. In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the

party pleading shall be bound to establish, on the trial, the facts showing such performance. In an action or defence founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party a specified sum, which he claims.

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Instrument
for payment
of money only.

SEC. 186. In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the Court shall thereupon take judicial notice thereof.

Private statutes,
how to be pleaded.

SEC. 187. In an action for libel or slander, it shall not be necessary to state, in the complaint, any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff shall be bound to establish, on trial, that it was so published or spoken.

Of libel and
slander, how
stated in complaint.

SEC. 188. In the actions mentioned in the last Section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances, to reduce the amount of damages; and, whether he prove the justification or not, he may give, in evidence, the mitigating circumstances.

Answer in
such cases.

SEC. 189. In an action to recover the possession of property distrained doing damage, an answer that the defendant, or person by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good, without setting forth the title to such real property.

In action to
recover property
that is distrained
for damage, answer
need not set forth title.

SEC. 190. The plaintiff may unite, in the same complaint, several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of—

What causes
of action may
be joined in
the same complaint.

1. The same transaction, or transactions connected with the same subject of action; or,
2. Contract, express or implied; or,
3. Injuries with or without force, to person and property, or either; or,
4. Injuries to character; or,
5. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or,
6. Claims to recover personal property, with or without damages for the withholding thereof; or,
7. Claims against a Trustee, by virtue of a contract, or by operation of law.

But the causes of action, so united, must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated. In actions to foreclose mortgages, the Court shall have power to adjudge and direct the payment, by the mortgagor, of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage; and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action, and the Court may adjudge payment of the residue of such debt remain-

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Allegation
not denied—
when to be
deemed true.

ing unsatisfied after a sale of the mortgaged premises against such other person, and may enforce such judgment as in other cases.

SEC. 191. Every material allegation of the complaint, not controverted by the answer, as prescribed in Section one hundred and seventy-two, and every material allegation of new matter in the answer, constituting a counter claim, not controverted by the reply, as prescribed in Section one hundred and seventy-six, shall, for purposes of the action, be taken as true. But the allegation of new matter in the answer, not relating to a counter claim, or of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require.

CHAPTER VI.

MISTAKES IN PLEADING, AND AMENDMENTS.

SEC. 192. Material variances, how provided for.

193. Immaterial variances, how provided for.

194. What not to be deemed a variance.

195. Amendments of course and after demurrer.

196. Amendments by the Court.

197. Court may give relief in case of mistake.

198. Suing a party by a fictitious name.

199. No error or defect to be regarded unless it affect substantial rights.

200. Supplemental complaint, answer, and reply.

Material va-
riance.

SEC. 192. No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence, upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the Court, and in what respect he has been misled; and thereupon the Court may order the pleading to be amended, upon such terms as shall be just.

Immaterial
variance.

SEC. 193. Where the variance is not material, as provided in the last Section, the Court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.

Failure of
proof.

SEC. 194. Where, however, the allegation of the cause of action or defence to which the proof is directed is not proved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, within the last two Sections, but a failure of proof.

Amendments
of course and
after allow-
ance of de-
murrer.

SEC. 195. Any pleading may be once amended by the party of course, without costs, and without prejudice to the proceedings already had, at any time within twenty days after it is served, or at any time before the period for answering it expires; or it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading, unless it be made to appear to the Court that it was done for

the purposes of delay, and the plaintiff or defendant will thereby lose the benefit of a circuit or term for which the cause is or may be noticed; and if it appear to the Court that such amendment was made for such purpose, the same may be stricken out, and such terms imposed as to the Court may seem just. In such case a copy of the amended pleading must be served on the adverse party. After the decision of a demurrer, either at a general or special term, the Court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead over upon such terms as may be just. If the demurrer be allowed for the cause mentioned in the fifth sub-division of Section one hundred and sixty-seven, the Court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned.

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SEC. 196. The Court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved.

Amendment
by order.

SEC. 197. The Court may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other Act to be done, after the time limited by this Act, or, by an order, enlarge such time; and may also, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respect to the provisions of this Code, the Court may, in like manner, and upon like terms, permit an amendment of such proceeding, so as to make it conformable thereto.

Relief in cases
of mistake

SEC. 198. When the Plaintiff shall be ignorant of the name of a Defendant, such Defendant may be designated in any pleading or proceeding by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

Fictitious
name.

SEC. 199. The Court shall, in every stage of action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

Error of defects to be
disregarded.

SEC. 200. The Plaintiff and Defendant respectively may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after the former complaint, answer or reply, or of which the party was ignorant when his former pleading was made, and either party may, by leave of the Court, in any pending or future action, set up by a supplemental pleading the judgment or decree of any Court of competent jurisdiction rendered since the commencement of such action, determining the matters in controversy in said action, or any part thereof, and if said judgment be set up by the Plaintiff, the same shall be without prejudice to any provisional remedy theretofore issued or other proceedings had in said action on his behalf.

Supplemental
pleading.

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TITLE VII.

OF THE PROVISIONAL REMEDIES IN CIVIL ACTIONS.

CHAPTER I. Arrest and bail.

II. Claim and delivery of personal property.

III. Injunction.

IV. Attachment.

V. Provisional remedies.

CHAPTER I.

ARREST AND BAIL.

- SEC. 201. No person to be arrested in a civil action, except as prescribed.
202. Arrest in civil actions, in what cases.
203. Order for arrest, by whom to be made.
204. Affidavit to obtain order for arrest. To what actions this Chapter applies.
205. Security by Plaintiff before obtaining order for arrest.
206. Order for arrest, when it may be made, and its form.
207. Original affidavit and order to be delivered to Sheriff, and copy to be delivered to Defendant.
208. Arrest, how made.
209. Defendant to be discharged on giving bail or making a deposit.
210. Bail, how given.
211. Surrender of Defendant.
212. The like.
213. Bail, how proceeded against.
214. Bail, how exonerated.
215. Delivery of undertaking of bail to Plaintiff, and its acceptance or rejection by him.
216. Notice of justification. New bail.
217. Qualification of bail.
218. Justification of bail.
219. Allowance of bail.
220. Deposit in lieu of bail.
221. Payment of deposit into Court.
222. Substituting bail for deposit.
223. Deposit, how disposed of after judgment in the action.
224. Sheriff, when liable as bail.
225. Proceedings on judgment against Sheriff.
226. Bail liable to Sheriff.
227. Vacating order of arrest or reducing bail.
228. Affidavits on motion to vacate order of arrest or reduce bail.

SEC. 201. No person shall be arrested in a civil action, except as prescribed by this Act; but the same shall not apply to proceedings for contempt.

No person
to be arrested
except as pre-
scribed.

SEC. 202. The defendant may be arrested, as hereinafter prescribed, in the following cases:

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1. In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is not resident of the State, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring or for wrongfully taking, detaining or converting property.

In what cases.

2. In an action for a fine or penalty, or for money received, or property embezzled or fraudulently misapplied, by a public officer, or by an attorney, solicitor or counsellor, or by an officer or agent of a corporation or banking association, in the course of his employment as such, or by any factor, agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

3. In an action to recover the possession of personal property unjustly detained, where the property, or any part thereof, has been concealed, removed or disposed of, so that it cannot be found or taken by the Sheriff or Constable, and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.

4. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

But no female shall be arrested in any action, except for a wilful injury to person, character or property.

SEC. 203. An order for the arrest of the defendant must be obtained from a Judge, Trial Justice, or Clerk of the Court, in which, or before whom, the action is brought.

Order for arrest, by whom made.

SEC. 204. The order may be made where it shall appear to the proper officer by the affidavit of the plaintiff or of any other person, that a sufficient cause of action exists, and that the case from the facts stated is one of those mentioned in Section two hundred and two.

Affidavit to obtain order. To what action this chapter applies.

SEC. 205. Before making the order, the Judge or other officer shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least one hundred dollars. If the undertaking be executed by the plaintiff, without sureties, he shall annex thereto an affidavit that he is a resident and householder or freeholder within the State and worth double the sum specified in the undertaking over all his debts and liabilities.

Security by plaintiff before order of arrest.

SEC. 206. The order may be made to accompany the summons, or at any time afterwards before judgment. It shall require the Sheriff or Constable of the County where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order, at a place and time therein mentioned, to the plaintiff or attorney by whom it shall be subscribed or indorsed.

Order, when made, and its form. Time to answer or to move to vacate.

But said order of arrest shall be of no avail, and shall be vacated or set aside on motion, unless the same is served upon the defendant, as pro-

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Affidavit and order to be delivered to the Sheriff or Constable, and a copy to the defendant.

Arrest, how made.

Defendant to be discharged on bail or deposit.

Bail, how to be given.

Surrender of defendant.

Surrender of defendant.

Bail, how to be proceeded against.

Bail, how exonerated.

vided by law, before the docketing of any judgment in the action; and the defendant shall have twenty days, after the service of the order of arrest, in which to answer the complaint.

SEC. 207. The affidavit and order of arrest shall be delivered to the Sheriff or Constable, who, upon arresting the defendant, shall deliver to him a copy thereof.

SEC. 208. The Sheriff or Constable shall execute the order by arresting the defendant and keeping him in custody until discharged by law, and may call the power of the County to his aid in the execution of the arrest, as in case of process.

SEC. 209. The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest as provided in this chapter.

SEC. 210. The defendant may give bail by causing a written undertaking to be executed by two or more sufficient bail, stating their places of residence and occupations, to the effect that the defendant shall at all times render himself amenable to the process of the Court, during the pendency of the action, and to such as may be issued to enforce the judgment therein; or, if he be arrested for the cause mentioned in third sub-division of Section two hundred and two, and undertaking to the same effect as that provided by Section two hundred and thirty-four.

SEC. 211. At any time before a failure to comply with the undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the Sheriff of the County where he was arrested, in the following manner:

1. A certified copy of the undertaking of the bail shall be delivered to the Sheriff or Constable, who shall detain the defendant in his custody, thereon, as upon an order of arrest, and shall, by a certificate in writing, acknowledge the surrender;

2. Upon the production of a copy of the undertaking and Sheriff's or Constable's certificate, a Judge or Clerk of the Court may, upon a notice to the plaintiff of eight days, with a copy of the certificate, order that the bail be exonerated; and on filing the order and the papers used on said application, they shall be exonerated accordingly. But this Section shall not apply to an arrest for cause mentioned in sub-division three of Section two hundred and two, so as to discharge the bail from an undertaking given to the effect provided by Section two hundred and thirty-four.

SEC. 212. For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or, by a written authority, indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

SEC. 213. In case of failure to comply with the undertaking, the bail may be proceeded against, by action only.

SEC. 214. The bail may be exonerated, either by the death of the defendant, or his imprisonment in a State prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the Sheriff or Constable of the County where he was arrested, in execution thereof, within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the Court.

SEC. 215. Within the time limited for that purpose, the Sheriff or Con-

stable shall deliver the order of arrest to the plaintiff, or attorney by whom it is subscribed, with his return indorsed, and a certified copy of the undertaking of the bail. The plaintiff, within ten days thereafter, may serve upon the Sheriff or Constable a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the Sheriff or Constable shall be exonerated from liability.

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Delivery of undertaking to plaintiff, and its acceptance or rejection by him.

SEC. 216. On the receipt of such notice, the Sheriff or Constable, or defendant, may, within ten days thereafter, give to the plaintiff, or attorney by whom the order of arrest is subscribed, notice of the justification of the same or other bail (specifying the places of residence and occupation of the latter) before a Judge or Clerk of the Court, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bail be given, there shall be a new undertaking, in the form prescribed in Section two hundred and ten.

Notice of justification.

New bail.

SEC. 217. The qualification of bail must be as follows:

Qualification of bail.

1. Each of them must be a resident, and householder or freeholder, within the State.

2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the Judge or Clerk of the Court, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

SEC. 218. For the purpose of justification, each of the bail shall attend before the Judge or Clerk of the Court at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the Judge, or Clerk of the Court, in his discretion, may think proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff.

Justification of bail.

SEC. 219. If the Judge, or Clerk of the Court, find the bail sufficient, he shall annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed in the office of the Clerk; and the Sheriff shall thereupon be exonerated from liability.

Allowance of bail.

SEC. 220. The defendant may, at the time of his arrest, instead of giving bail, deposit with the Sheriff or Constable the amount mentioned in the order. The Sheriff shall thereupon give the defendant a certificate of the deposit and the defendant shall be discharged out of custody.

Deposit with the Sheriff.

SEC. 221. The Sheriff or Constable shall, within four days after the deposit, pay the same into Court, and shall take from the officer receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff, and the other to the defendant. For any default in making such payment the same proceedings may be had on the official bond of the Sheriff or Constable, to collect the sum deposited, as in other cases of delinquency.

Payment of deposit into Court.

SEC. 222. If money be deposited, as provided in the last two Sections, bail may be given and justified upon notice, as prescribed in Section two hundred and sixteen, any time before judgment; and thereupon the Judge before whom the justification is had shall direct, in the order of allowance, that the money deposited be refunded by the Sheriff or Constable to the defendant, and it shall be refunded accordingly.

Substituting bail for deposit.

SEC. 223. Where money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the

Deposit, how disposed of

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plaintiff, the Clerk shall, under direction of the Court, apply the same in satisfaction thereof, and after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the Clerk shall refund to him the whole sum deposited and remaining unapplied.

The Sheriff or Constable, when liable as bail.

SEC. 224. If, after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the Sheriff or Constable shall himself be liable as bail. But he may discharge himself from such liability by the giving and justification of bail, as provided in Sections two hundred and sixteen, two hundred and seventeen, two hundred and eighteen, and two hundred and nineteen, at any time before process against the person of the defendant to enforce an order or judgment in the action.

Proceedings on judgment against Sheriff.

SEC. 225. If a judgment be recovered against the Sheriff or Constable, upon his liability as bail, and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on the official bond of the Sheriff or Constable to collect the deficiency, as in other cases of delinquency.

Bail liable to Sheriff.

SEC. 226. The bail taken upon the arrest shall, unless they justify, or other bail be given or justified, be liable to the Sheriff or Constable by action for damages which he may sustain by reason of such omission.

Vacating order of arrest or reducing bail.

SEC. 227. A defendant arrested may, at any time before judgment, apply, on motion, to vacate the order of arrest, or to reduce the amount of bail.

Affidavit on motion.

SEC. 228. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proofs, in addition to those on which the order of arrest was made.

CHAPTER II.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

SEC. 229. Claim and delivery of personal property.

230. Affidavit and its requisites.

231. Requisition to Sheriff to take and deliver the property.

232. Security by plaintiff.

233. Exception to sureties.

234. Defendant, when entitled to re-delivery.

235. Justification of defendant's sureties.

236. Qualification and justification of sureties.

237. Property, how taken when concealed in building or inclosure.

238. Property, how kept.

239. Claim of property by third person.

240. Notice and affidavit, when and where to be filed.

Delivery of personal property.

SEC. 229. The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time

before answer, claim the immediate delivery of such property, as provided in this chapter.

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SEC. 230. Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing:

Affidavit—
its requisites

1. That the plaintiff is the owner of the property claimed, (particularly describing it,) or is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts in respect to which shall be set forth;

2. That the property is wrongfully detained by the defendant;

3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief;

4. That the same has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and

5. The actual value of the property.

SEC. 231. The plaintiff may, thereupon, by an indorsement in writing upon the affidavit, require the Sheriff of the County where the property claimed may be, to take the same from the defendant and deliver it to the plaintiff.

Requisition
to Sheriff to
take and deli-
ver the prop-
erty.

SEC. 232. Upon the receipt of the affidavit and notice, with a written undertaking executed by one or more sufficient sureties, approved by the Sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the Sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion.

Security by
plaintiff.

SEC. 233. The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the Sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice, in like manner as upon bail on arrest. And the Sheriff shall be responsible for the sufficiency of the sureties, until the objection to them is either waived as above provided, or until they shall justify, or new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim the property, as provided in the next Section.

Exception to
sureties.

SEC. 234. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the Sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property

Defendant,
when entitled
to re-delivery.

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Justification
of defendant's
sureties.

be not so required, within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiffs, except as provided in Section two hundred and thirty-nine.

SEC. 235. The defendant's sureties, upon a notice to the plaintiff of not less than two nor more than six days, shall justify before a Judge, Clerk of the Court, or Trial Justice, in the same manner as upon bail on arrest. Upon such justification, the Sheriff shall deliver the property to the defendant. The Sheriff shall be responsible for the defendant's sureties until they justify, or until justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

Qualifications
and justifica-
tion of sure-
ties.

SEC. 236. The qualifications of sureties and their justification shall be as are prescribed by Sections two hundred and seventeen and two hundred and eighteen in respect to bail upon an order of arrest.

Property—
how to be ta-
ken when con-
cealed in a
building or in-
closure.

SEC. 237. If the property, or any part thereof, be concealed in a building or inclosure, the Sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his County.

Property—
how kept.

SEC. 238. When the Sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping, the same.

Claim of prop-
erty by third
person.

SEC. 239. If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto, and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the Sheriff, the Sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, shall indemnify the Sheriff against such claim, by an undertaking, executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property, as specified in the affidavit of the plaintiff, and freeholders and householders of the County. And no claim to such property, by any other person than the defendant or his agent, shall be valid against the Sheriff, unless made as aforesaid; and, notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

Notice and af-
fidavit, when
and where to
be filed.

SEC. 240. The Sheriff shall file the notice and affidavit, with his proceedings thereon, with the Clerk of the Court in which the action is pending, within twenty days after taking the property mentioned therein.

CHAPTER III.

INJUNCTION.

SEC. 241. Writ of injunction abolished, and order substituted.

242. Temporary injunction, in what cases granted.

243. At what time it may be granted. Copy affidavit to be served.

SEC. 244. Injunction after answer.

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245. Security upon injunction. Damages, how ascertained.

246. Order to show cause why injunction should not be granted.

247. Security upon injunction to suspend business of corporation.

248. Motion to vacate or modify injunction.

249. Affidavits on motion.

SEC. 241. An order of injunction may be made by the Circuit Court in which the action is brought, or by a Judge thereof, and in the absence from the Circuit, or inability, from any cause, of a Judge thereof, by a Judge of any other Circuit, or a Justice of the Supreme Court.

Injunction
by order.

SEC. 242. [1] Where it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or [2] when, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. [3] And where, during the pendency of an action, it shall appear by affidavit that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition.

Injunction,
in what cases.

SEC. 243. The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, upon its appearing satisfactorily to the Court or Judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction.

Injunction,
at what time
granted.
Copy affidavits to be served.

SEC. 244. An injunction shall not be allowed after the defendant shall have answered, unless upon notice or upon an order to show cause; but in such case the defendant may be restrained until the decision of the Court or Judge granting or refusing the injunction.

Injunction
after answer.

SEC. 245. When no provision is made by statute as to security upon an injunction, the Court or Judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the Court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the Court shall direct.

Security upon
injunction.

SEC. 246. If the Court or Judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained.

Damages.

Order to show
cause.

SEC. 247. An injunction to suspend the general and ordinary business of a corporation shall not be granted except by the Court or a Judge thereof. Nor shall it be granted without due notice of the application therefor, to the proper officers of the corporation, except where the State is a party to the proceeding, and except in proceedings to enforce the liability of stockholders in corporations and associations for banking

Restraint in
meantime.

Security upon
injunction
to suspend business of corporation.

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purposes, after the first day of January, one thousand eight hundred and seventy, as such proceedings are or shall be provided by law, unless the plaintiff shall give a written undertaking, executed by two sufficient sureties, to be approved by the Court or Judge, to the effect that the plaintiff will pay all damages, not exceeding the sum to be mentioned in the undertaking, which such corporation may sustain by reason of the injunction, if the Court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the Court shall direct.

Motion to vacate or modify injunction.

SEC. 248. If the injunction be granted by the Court or a Judge thereof, without notice, the defendant, at any time before the trial, may apply, upon notice to the Court or a Judge thereof, in which the action is brought, to vacate or modify the same. The application may be made upon the complaints and the affidavits on which the injunction was granted, or upon affidavits on the part of the defendant, with or without the answer.

Affidavits on motion.

SEC. 249. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the injunction was granted.

CHAPTER IV.

ATTACHMENT.

SEC. 250. Property of foreign corporations, and of non-resident or absconding or concealed defendants, may be attached.

251. Attachment, by whom granted.

252. In what cases attachment may be issued. Affidavits to be filed.

253. Security on obtaining attachment.

254. Attachment, to whom directed, and what to require.

255. Property to be attached.

256. Sheriff's duties in case.

257. Proceedings in case of perishable property or vessels.

258. Interest in corporations or associations liable to attachment.

259. Attachment, how executed on property incapable of manual delivery.

260. Certificate of defendant's interest to be furnished.

261. Judgment, how satisfied.

262. When action to recover notes, &c., of defendant, may be prosecuted by the plaintiff in the action in which the attachment issued.

263. Bond to Sheriff on attachment, how disposed of on judgment for defendant.

264. Discharge of attachment, and return of property or its proceeds to defendant, on his appearance in the action.

265. Undertaking on the part of the defendant.

266. When Sheriff to return attachment with his proceeding thereon.

SEC. 250. In an action arising on contract for the recovery of money only, or in an action for the wrongful conversion of personal property, against a corporation created by or under the laws of any other State, government or country, or against a defendant who is not a resident of this State, or against a defendant who has absconded or concealed himself, or whenever any person or corporation is about to remove any of his or its property from this State, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete any of his or its property, with intent to defraud creditors, as hereinafter mentioned, the plaintiff, at the time of issuing the summons, or any time afterwards, may have the property of such defendant or corporation attached, in the manner herein-after prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover; and for the purposes of this Section an action shall be deemed commenced when the summons is issued: Provided, however, That personal service of such summons shall be made, or publication thereof commenced within thirty days.

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Property of foreign corporations and of non-resident or absconding or of concealed defendants to be attached.

SEC. 251. A warrant of attachment must be obtained from a Judge or Clerk of the Court, or Trial Justice, in which or before whom the action is brought, or from a Circuit Judge.

Warrant, by whom granted.

SEC. 252. The warrant may be issued whenever it shall appear by affidavit that a cause of action exists against such defendant, specifying the amount of the claim and the grounds thereof, and that the defendant is either a foreign corporation, or not a resident of this State, or has departed therefrom with intent to defraud his creditors or to avoid the service of a summons, or keep himself concealed therein with the like intent, or that such corporation or person has removed or is about to remove any of his or its property from this State, with intent to defraud his or its creditors, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete any of his or its property, with the like intent, whether such defendant be a resident of this State or not.

In what cases a warrant may be issued—affidavits to be filed.

It shall be the duty of the plaintiff procuring such warrant, within ten days after the issuing thereof, to cause the affidavits on which the same was granted to be filed in the office of the Clerk of the County, or with the Trial Justice, in which, or before whom, the action is to be tried.

SEC. 253. Before issuing the warrant, the Judge, Clerk or Trial Justice shall require a written undertaking, on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recover judgment, or the attachment be set aside by order of the Court, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred and fifty dollars, except in case of a warrant issued by a Trial Justice, when it shall be at least twenty-five dollars.

Of security on obtaining warrant.

SEC. 254. The warrant shall be directed to any Sheriff or Constable of any County in which property of such defendant may be, and shall require him to attach and safely keep all the property of such defendant within his County, or so much thereof as may be sufficient to satisfy the plaintiff's demand, together with costs and expenses, the amount of which must be stated in conformity with the complaint, together with costs and expenses. Several warrants may be issued at the same time to the Sheriffs or Constables of different Counties.

Warrant, to whom directed and what to require.

SEC. 255. The Sheriff or Constable to whom such warrant is directed

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Property to
be attached.
Warrant of
attachment—
how levied on
real estate.

and delivered shall immediately attach all the real estate of such debtor, and all his personal estate, including money and bank notes, except such real and personal estate as is exempt from attachment, levy or sale by the Constitution; and shall take into his custody all books of account, vouchers and papers relating to the property, debts, credits and effects of such debtor, together with all evidences of his title to real estate, which he shall safely keep, to be disposed of as hereinafter directed.

When real estate is attached, a true and attested copy of such attachment, together with a description of the real estate attached, shall be, by the officer serving the same, delivered to the party whose real estate is attached, or left at his last and usual place of abode; and the officer making such service shall also leave a true and attested copy of such attachment, together with a description of the real estate so attached, in the office where, by law, a deed of such real estate is required to be recorded; and if the party whose estate is attached does not reside in this State, then such copy shall be delivered to his tenant, agent or attorney, if any be known; and if no such agent, tenant or attorney be known, then a copy of such warrant of attachment, with the officer's return thereon, lodged in the office where, by law, a deed of such real estate ought to be recorded, shall be deemed sufficient service. It shall be the duty of the Clerk or Register of the office wherein said warrant of attachment is required to be lodged to receive the same and enter in a book kept for that purpose the names of the parties, the date of the warrant of attachment, the sum demanded, and the officer's return thereon. Said attachment shall be a lien, subject to all prior liens, and bind the real estate attached from the date of lodgment: Provided, That all attachments lodged upon the same day shall take rank together.

Of the duties
of Sheriffs or
Constables in
case.

SEC. 256. He shall, immediately on making such seizure, with the assistance of two disinterested freeholders, make a just and true inventory of all the property so seized, and of the books, vouchers and papers taken into custody, stating therein the estimated value of the several articles of personal property, and enumerating such of them as are perishable, which inventory, after being signed by the Sheriff and appraisers, shall, within ten days after such seizure, be returned to the officer who issued the warrant; and the Sheriff or Constable shall, under the direction of such officer, collect, receive and take into his possession all debts, credits and effects of such debtor, and commence such suits, and take such legal proceedings, either in his own name or in the name of such debtor, as may be necessary for that purpose, prosecute and discontinue the same at such times and on such terms as the Court may direct. The property so seized, or the proceeds of such as shall have been sold, and debts collected, shall be kept to answer any judgment which may be obtained in such action.

Proceedings
in case of per-
ishable prop-
erty on ves-
sels.

SEC. 257. If any property so seized shall be perishable, or if any part of it be claimed by any other person than such defendant, or if any part of it consist of a vessel, or of any share or interest therein, the same proceedings shall be had in all respects as are provided by law upon attachments against absent debtors.

Interest in
Corporations,
or in associa-
tions liable to
attachment.

SEC. 258. The rights or shares which such defendant may have in the stock of any association or corporation, together with the interest and profits thereon, and all other property in this State of such defendant, except that exempt from attachment by the Constitution, shall be liable to

be attached and levied upon, and sold to satisfy the judgment and execution.

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SEC. 259. The execution of the attachment upon any such rights, shares, or any debts or other property incapable of manual delivery to the Sheriff or Constable shall be made by leaving a certified copy of the warrant of attachment with the President or other head of the association or corporation, or the Secretary, Cashier, or managing agent thereof, or with the debtor or individual holding such property, with a notice showing the property levied on.

Attachment not executed on property incapable of manual delivery.

SEC. 260. Whenever the Sheriff or Constable shall, with a warrant of attachment, or execution against the defendant, apply to such officer, debtor, or individual, for the purpose of attaching, or levying upon such property, such officer, debtor, or individual shall furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in the stock of such association or corporation, with any dividend or incumbrance thereon, or the amount and description of the property held by such association, corporation, or individual, for the benefit of or debt owing to the defendant. If such officer, debtor, or individual refuse to do so, he may be required by the Court or Judge to attend before him, and be examined on oath, concerning the same, and obedience to such order may be enforced by attachment.

Certificate of defendant's interest to be furnished.

SEC. 261. In case judgment be entered for the plaintiff in such action, the Sheriff or Constable shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose—

Judgment—how satisfied.

1. By paying over to such plaintiff the proceeds of all sales of perishable property, and of any vessel, or share or interest in any vessel, sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy such judgment.

2. If any balance remain due, and an execution shall have been issued on such judgment, he shall proceed to sell, under such execution, so much of the attached property, real or personal, except as provided in subdivision four of this Section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares in the stock of a corporation or association, the Sheriff or Constable shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges in respect thereto which were had by such defendant.

3. If any of the attached property belonging to the defendant shall have passed out of the hands of the Sheriff or Constable without having been sold or converted into money, such Sheriff or Constable shall repossess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the attachment; and any person who shall wilfully conceal or withhold such property from the Sheriff or Constable shall be liable to double damages, at the suit of the party injured.

4. Until the judgment against the defendant shall be paid, the Sheriff or Constable may proceed to collect the notes and other evidences of debt, and the debts that may have been seized or attached under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment.

At the expiration of six months from the docketing of the judgment,

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the Court shall have power, upon the petition of the plaintiff, accompanied by an affidavit setting forth fully all the proceedings which have been had by the Sheriff or Constable since the service of the attachment, the property attached, and the disposition thereof, and also the affidavit of the Sheriff or Constable that he has used diligence and endeavored to collect the evidences of debt in his hands so attached, and that there remains uncollected of the same any part or portion thereof, to order the Sheriff or Constable to sell the same, upon such terms and in such manner as shall be deemed proper. Notice of such application shall be given to the defendant or his attorney, if the defendant shall have appeared in the action. In case the summons has not been personally served on the defendant, the Court shall make such rule or order, as to the service of notice and the time of service, as shall be deemed just.

When the judgment and all costs of the proceedings shall have been paid, the Sheriff or Constable, upon reasonable demand, shall deliver over to the defendant the residue of the attached property, or the proceeds thereof.

When action for recovery of notes, &c., of defendant may be prosecuted by the plaintiff in the action in which the attachment is issued.

SEC. 262. The actions herein authorized to be brought by the Sheriff or Constable may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the Sheriff or Constable of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the Sheriff or Constable from all damages, costs and expenses on account thereof, not exceeding two hundred and fifty dollars in any one action. Such sureties shall, in all cases, when required by the Sheriff or Constable, justify by making an affidavit that each is a householder, and worth double the amount of the penalty of the bond, over and above all demands and liabilities.

Bond to the Sheriff or Constable on an attachment—how disposed of on a judgment for the defendant.

SEC. 263. If the foreign corporation, or absent or absconding or concealed defendant, recover judgment against the plaintiff in such action, any bond taken by the Sheriff or Constable, except such as are mentioned in the last Section, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant, or his agent, on request, and the warrant shall be discharged, and the property released therefrom.

Discharge of attachment & return of property or its proceeds to defendant on appearance in action.

SEC. 264. Whenever the defendant shall have appeared in such action, he may apply to the officer who issued the attachment, or to the Court, for an order to discharge the same; and if the same be granted, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered or paid by him to the defendant or his agent, and released from the attachment.

And where there is more than one defendant, and several property of either of the defendants has been seized by virtue of the order of attachment, the defendant whose several property has been seized may apply to the officer who issued the attachment for relief under this Section.

Undertaking on the part of the defendant—discharge of attachment.

SEC. 265. Upon such application, the defendant shall deliver to the Court or officer an undertaking executed by at least two sureties, who are resident and freeholders or householders in this State, approved by such Court or officer, to the effect that such sureties will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking, which shall be at least double the amount claimed by the plaintiff in his complaint. If it shall appear by affidavit that the property attached be

less than the amount claimed by the plaintiff, the Court, or officer issuing the attachment, may order the same to be appraised, and the amount of the undertaking shall then be double the amount so appraised. And in all cases the defendant may move to discharge the attachment, as in the case of other provisional remedies.

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And where there is more than one defendant, and several property of either of the defendants has been seized by virtue of the order of attachment, the defendant whose several property has been seized may deliver to the Court or officer an undertaking, in accordance with the provisions of this Section, to the effect that he will, on demand, pay to the plaintiff the amount of judgment that may be recovered against such defendant. And all the provisions of this Section applicable to such undertaking shall be applied thereto.

SEC. 266. When the warrant shall be fully executed or discharged, the Sheriff or Constable shall return the same, with his proceedings thereon, to the Court in which the action was brought.

When Sheriff to return warrant with proceedings.

CHAPTER V.

PROVISIONAL REMEDIES.

SEC. 267. A receiver may be appointed :

1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property, or its rents and profits, are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had without application to the Court.

Powers of Court as to receivers, deposit of money, &c., in Court, and other provisional remedies.

2. After judgment, to carry the judgment into effect.

3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment-debtor refuses to apply his property in satisfaction of the judgment.

Judgment for sum admitted due.

4. In the cases provided in this Code and by statute, when a corporation has been dissolved, or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights; and in like cases, of the property within this State of foreign corporations. Receivers of the property within this State of foreign or other corporations shall be allowed such commissions as may be fixed by the Court appointing them, not exceeding five per cent. on the amount received and disbursed by them.

5. In such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided in this Act.

When it is admitted, by the pleading or examination of a party, that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee, for another party, or which belongs or is due to another party, the Court may order the same to be deposited in Court, or delivered to such party, with or without security, subject to the further direction of the Court.

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Whenever, in the exercise of its authority, a Court shall have ordered the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the Court, besides punishing the disobedience as for contempt, may make an order requiring the Sheriff or Constable to take the money or property, and deposit, deliver, or convey it, in conformity with the direction of the Court.

When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the Court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy.

TITLE VIII.

OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS.

CHAPTER I. Judgment upon failure to answer, &c.

- II. Issues and the mode of trial.
- III. Trial by jury.
- IV. Trial by the Court.
- V. Trial by referees.
- VI. The manner of entering judgment.

CHAPTER I.

JUDGMENT UPON FAILURE TO ANSWER, &C.

SEC. 268. Judgment defined.

269. Judgment on failure of defendant to answer, or for excess over counter claim.

270. Judgment on frivolous demurrer, answer or reply.

Judgment defined.

SEC. 268. A judgment is the final determination of the rights of the parties in the action.

Judgment on failure of defendant to answer, or for excess over counter claim

SEC. 269. Judgment may be had, if the defendant fail to answer the complaint, as follows :

1. In any action arising on contract for the recovery of money only, the plaintiff may file with the Clerk proof of personal service of the summons and complaint on one or more of the defendants, or of the summons according to the provisions of Section one hundred and fifty-three, and that no answer has been received. The Clerk shall thereupon enter judgment for the amount mentioned in the summons, against the defendant, or defendants, or against one or more of several defendants, in the cases provided for in Section one hundred and fifty-nine. But if the complaint be not sworn to, and such action is on an instrument for the payment of money only, the Clerk, on its production to him, shall assess the amount due to the plaintiff thereon ; and in other cases shall ascertain the amount which the plaintiff is entitled to recover in such action, from his examination, under oath, or other proof, and enter the judgment for the amount so

assessed or ascertained. In case the defendant give notice of appearance in the action, he shall be entitled to five days' notice of the time and place of such assessment.

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Where the defendant, by his answer in any such action, shall not deny the plaintiff's claim, but shall set up a counter claim, amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counter claim, in like manner in any such action, upon the plaintiff's filing with the Clerk of the Court a statement admitting such counter claim, which statement shall be annexed to and be a part of the judgment-roll.

2. In other actions the plaintiff may, upon the like proof, apply to the Court, after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account or the proof of any fact be necessary to enable the Court to give judgment, or to carry the judgment into effect, the Court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of money only, or of specific real or personal property, with damages for the withholding thereof, the Court may order the damages to be assessed by a jury, or, if the examination of a long account be involved, by a reference as above provided. If the defendant give notice of appearance in the action before the expiration of the time for answering, he shall be entitled to eight days' notice of the time and place of application to the Court for the relief demanded by the complaint.

3. In actions where the service of the summons was by application, the plaintiff may, in like manner, apply for judgment, and the Court must thereupon require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the State, must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover. Before rendering judgment the Court may, in its discretion, require the plaintiff to cause to be filed satisfactory security, to abide the order of the Court, touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives shall apply and be admitted to defend the action, and shall succeed in such defence.

SEC. 270. If a demurrer, answer or reply be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a Judge of the Court, either in or out of the Court, for judgment thereon, and judgment may be given accordingly.

Judgment
on frivolous
demurrer, an-
swer or reply.

CHAPTER II.

ISSUES AND THE MODE OF TRIAL.

SEC. 271. The different kinds of issues.

272. Issue of law.

273. Issue of fact.

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SEC. 274. On issues of both law and fact. The issue of law to be first tried.

275. Trial defined.

276. Issues. How tried.

277. Issues triable by the Court.

278. Either party may give notice of trial. Note of issue.

279. Stenographer to be appointed by the several Circuits. To take stenographic notes.

280. Duty of stenographer.

281. Order of disposing of issues on the calendar.

The different kinds of issues. SEC. 271. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

Issue of law.

SEC. 272. An issue of law arises:

1. Upon a demurrer to the complaint, answer or reply, or to some part thereof.

Issue of fact.

SEC. 273. An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer; or,
2. Upon new matter in the answer controverted by the reply; or,
3. Upon new matter in the reply, except an issue of law is joined thereon.

On issues of both law and fact, the issue of law to be first tried.

SEC. 274. Issues, both of law and of fact, may arise upon different parts of the pleadings in the same action. In such cases, the issues of law must be first tried, unless the Court otherwise direct.

Trial defined.

SEC. 275. A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

Issues, how tried.

SEC. 276. An issue of law must be tried by the Court, unless it be referred as provided in Sections two hundred and ninety-four and two hundred and ninety-five. An issue of fact, in an action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract on the ground of adultery, must be tried by a jury, unless a jury trial be waived, as provided in Section two hundred and ninety, or a reference be ordered, as provided in Sections two hundred and ninety-four and two hundred and ninety-five.

Other issues to be tried by the Court.

SEC. 277. Every other issue is triable by the Court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it, as provided in Sections two hundred and ninety-four and two hundred and ninety-five.

Either party may give notice of trial. Note of issue.

SEC. 278. At any time after issue, and at least fourteen days before the Court, either party may give notice of trial. The party giving the notice shall furnish the Clerk, at least eight days before the Court, with a note of the issue containing the title of the action, the names of the attorneys, and the time when the last pleading was served, and the Clerk shall thereupon enter the cause upon the calendar, according to the date of the issue. There need be but one notice of trial, and one note of issue from either party, and the action shall then remain on the calendar until disposed of, and when called may be brought to trial by the party giving the notice. In every action in which issue of fact is now joined, and the ac-

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tion is now placed upon the calendar of the Court of Common Pleas, in the First, Second and Fifth Circuits, the party who shall have filed such note of issue, shall, as a condition precedent to such action being brought to trial, pay to the Clerk of the Court the sum of three dollars; and in every action in either of the said Courts, commenced after the passage of this Act, the party who shall file therein a first note of issue of fact, shall, as a condition precedent to such filing, pay to the Clerk of the Court the sum of three dollars; and the amounts so received shall be accounted for under oath, and paid over monthly, by the Clerk of each of said Courts, to the County Treasurer, to be used as a fund for the payment of the salaries of stenographers employed in Courts. If the fund thus created be inadequate to pay such salaries, the additional amount necessary for such payment shall be paid by the County Treasurers of the several Counties in the Circuit out of any moneys raised for County purposes, and in proportion to the valuation for taxation of their respective Counties. The several County Auditors in a Circuit shall furnish the Circuit Solicitor, on demand, a certificate of the amount of taxable property in their respective Counties, upon which he shall apportion to said Counties the several sums to be paid by them to the stenographer, which sums shall be paid upon the order of the Solicitor, approved by the Judge of the Circuit. Any surplus in the fund received by County Treasurers to pay the salary of stenographers shall be appropriated to County purposes.

SEC. 279. The Judges of the First, Second and Fifth Circuit Courts shall each appoint a stenographer for their several Circuits, who shall be a sworn officer of the Court, and who shall hold office during the pleasure of the Court, and shall be paid a salary of twenty-five hundred dollars per annum, payable quarterly, upon the order of the presiding Judge. It shall be the duty of every stenographer so appointed for any Circuit, under the direction of the presiding Judge thereof, to take full stenographic notes of all proceedings, including the rulings and charge of the Court in every trial thereat, and in case the presiding Judge shall require a transcript of said stenographic notes, he may order the same to be furnished by the stenographer.

A stenographer to be appointed for three circuits, to take full stenographic notes of trial.

SEC. 280. It shall be the duty of such stenographer to furnish to any party to such trials, upon request, a copy of the evidence and proceedings taken by him on such trials, or of such part thereof as may be required, on payment, on behalf of such party, of ten cents for every one hundred words of the copy so furnished. The sum paid as a condition precedent to the cause being brought on trial, or to the first note of issue being filed as hereinbefore provided, shall be deemed a necessary disbursement within the meaning of Section three hundred and thirty-seven of the Code of Procedure, and shall be allowed as such to the prevailing party in the action.

Duty of stenographer.

SEC. 281. The issues on the calendar shall be disposed of in the following order, unless, for the convenience of parties or the dispatch of business, the Court shall otherwise direct:

Order of disposing of issues on the calendar.

1. Issues of fact to be tried by a jury;
2. Issues of fact to be tried by the Court;
3. Issues of law.

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CHAPTER III.

TRIAL BY JURY.

SEC. 282. Notice of trial. Separate trials.

283. Court to be furnished with a copy of the pleadings.

284. General and special verdicts defined.

285. When jury may render either general or special verdict, and when the Court may direct a special finding.

286. On special finding with a general verdict, the former to control.

287. Jury to assess defendant's damages in certain cases.

288. Entry of the verdict. Motion for new trial.

289. Motion for new trial, or for judgment on special verdict, where to be heard.

Notice of trial.

SEC. 282. Either party giving the notice, may bring the issue to trial, and in absence of the adverse party, unless the Court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the complaint, or a verdict or judgment, as the case may require. A separate trial between a plaintiff and any of the several defendants may be allowed by the Court, whenever, in its opinion, justice will thereby be promoted.

Separate trial.

The Court to be furnished with a copy of pleadings, &c.

SEC. 283. When the issue shall be brought to trial by the plaintiff, he shall furnish the Court with a copy of the summons and pleadings, with the offer of defendant, if any shall have been made. When the issue shall be brought to trial by the defendant, and the plaintiff shall neglect or refuse to furnish the Court with a copy of the summons and pleadings and the offer of the defendant, the same may be furnished by the defendant.

General and special verdict defined.

SEC. 284. A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the Court.

When jury to render general or special verdict, and when Court may direct a special finding.

SEC. 285. In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or if it have, and the defendant by his answer claim a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff; or if they find in favor of the defendant, and that he is entitled to a return thereof; and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property.

In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the Court may direct the jury to find a special verdict in writing, upon any or all of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the Clerk, and entered upon the minutes.

On special finding with general verdict, former to control.

SEC. 286. Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the Court shall give judgment accordingly.

SEC. 287. When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a set-off for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury must also assess the amount of the recovery; they may also, under the direction of the Court, assess the amount of the recovery when the Court give judgment for the plaintiff on the answer. If a set-off, established at the trial, exceed the plaintiff's demand so established, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

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Jury to assess defendant's damages in certain cases.

SEC. 288. [1.] Upon receiving a verdict, the Clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon, or an order that the cause be reserved for argument or further consideration. If a different direction be not given by the Court, the Clerk must enter judgment in conformity with the verdict. [2.] If an exception be taken, it may be reduced to writing at the time, or entered in the Judge's minutes, and afterwards settled as provided by the rules of Court, and then stated in writing in a case, or separately, with so much of the evidence as may be material to the questions to be raised, but need not be sealed or signed, nor need a bill of exceptions be made. [3.] If the exceptions be in the first instance stated in a case, and it be afterwards necessary to separate them, the separation may be made under the direction of the Court, or a Judge thereof. [4.] The Judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motions in actions hereafter tried, if heard upon the minutes, can only be heard at the same term at which the trial is had. When such motion is heard and decided upon the minutes of the Judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had.

Entry of the verdict. Motion for new trial on the Judge's minutes.

SEC. 289. A motion for a new trial, on a case or exceptions, or otherwise, and an application for judgment on a special verdict or case reserved for argument or further consideration, must, in the first instance, be heard and decided at the same term, except that when exceptions are taken the Judge trying the cause may, at the trial, direct them to be heard in the first instance at the next or special term, and the judgment in the meantime suspended; and in that case they must be there heard in the first instance, and judgment there given. And when, upon a trial, the case presents only questions of law, the Judge may direct a verdict.

Motion for new trial on a case, &c. Verdict subject to the opinion of the Court.

CHAPTER IV.

TRIAL BY THE COURT.

SEC. 290. Trial by jury, how waived.

291. On trial by the Court, judgment, how given. Motion for new trial.

292. Exceptions, how and when taken. Judgment at general term.

293. Proceedings upon judgment on issue of law.

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Trial by jury,
how waived.

SEC. 290. Trial by jury may be waived by the several parties to an issue of fact, in actions on contract, and, with the assent of the Court, in other actions, in the manner following:

1. By failing to appear at the trial.
2. By written consent, in person, or by attorney, filed with the Clerk.
3. By oral consent in open Court, entered in the minutes.

On trial by
the Court.
Judgment—
how to be given.

SEC. 291. Upon the trial of a question of fact by the Court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law, separately; and upon a trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision shall be filed with the Clerk within sixty days after the Court at which the trial took place. Judgment upon the decision shall be entered accordingly.

Exceptions,
how and when
taken.
Motion for
new trial.
Judgment at
general term.

SEC. 292. [1.] For the purposes of an appeal, either party may except to a decision on a matter of law arising upon such trial within ten days after notice in writing of the judgment, in the same manner and with the same effect as upon a trial by jury: Provided, however, That where the decision filed under Section two hundred and ninety-one does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may move for a new trial at the next term, and for that purpose may, within ten days after notice of the decision being filed, except thereto, and make a case or exceptions as above provided in cases of an appeal.

[2.] And either party desiring a review upon the evidence appearing on the trial, either of the questions of fact or of law, may, at any time within ten days after notice of the judgment, or within such time as may be prescribed by the rules of the Court, make a case or exceptions in like manner as upon a trial by jury, except that the Judge, in settling the case, must briefly specify the facts found by him, and his conclusion of law.

Proceedings
on judgment
on issue at
law.

SEC. 293. On a judgment for the plaintiff upon an issue of law, the plaintiff may proceed in the manner prescribed by the first two subdivisions of Section two hundred and sixty-nine, upon the failure of the defendant to answer, where the summons was personally served. If judgment be for the defendant, upon an issue of law, and if taking of an account or the proof of any fact be necessary to enable the Court to complete the judgment, a reference or assessment by jury may be ordered, as in that Section provided.

CHAPTER V.

TRIAL BY REFEREES.

- SEC. 294. All issues referable by consent.
295. When a reference may be compulsorily ordered.
296. Mode of trial. Effect of report. Review.
297. Referees, how chosen. Report.

All issues
referable by
consent.

SEC. 294. All or any of the issues in the action, whether of fact or of law, or both, may be referred upon the written consent of the parties.

SEC. 295. Where the parties do not consent, the Court may, upon the application of either, or of its own motion, except where the investigation will require the decision of difficult questions of law, direct a reference in the following cases:

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When reference may be compulsorily ordered.

1. Where the trial of an issue of fact shall require the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or,

2. Where the taking of an account shall be necessary for the information of the Court, before judgment, or for carrying a judgment or order into effect; or,

3. Where a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action.

SEC. 296. The trial by referees shall be conducted in the same manner, and on similar notice, as a trial by the Court. They shall have the same power to grant adjournments, and to allow amendments to any pleadings and to the summons, as the Court, upon such trial, upon the same terms and with the like effect. They shall have the same power to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses before them by attachment, and to punish them as for contempt for non-attendance or refusal to be sworn or testify, as is possessed by the Court. They must state the facts found, and the conclusions of law separately; and their decision must be given, and may be excepted to and reviewed in like manner, and with like effect in all respects as in cases of appeal under Section two hundred and ninety-two; and they may in like manner settle a case or exceptions. The report of the referees upon the whole issue shall stand as the decision of the Court, and judgment may be entered thereon in the same manner as if the action had been tried by the Court. When the reference is to report the facts, the report shall have the effect of a special verdict.

Mode of trial. Effect of report. Decision reviewed

When the case shall have been heard and decided upon the report of the referee and exceptions, the decision may be reviewed, on appeal to the Supreme Court.

SEC. 297. In all cases of reference the parties to whom issues are formed in the action (except when the defendant is an infant or an absentee) may agree in writing upon a person or persons, not exceeding three, and a reference shall be ordered to him or them, and to no other person or persons. And if such parties do not agree, the Court shall appoint one or more referees, not more than three, who shall be free from exception. And no person shall be appointed referee to whom all parties in the action shall object, except in actions for divorce. And no Judge or Justice of any Court shall sit as referee in any action pending in the Court of which he is Judge or Justice, and not already referred, unless the parties otherwise stipulate. The referee or referees shall make and deliver a report within sixty days from the time the action shall be finally submitted; and in default thereof, and before the report is delivered, either party may serve notice upon the opposite party that he elects to end the reference; and thereupon the action shall proceed as though no reference had been ordered, and the referees shall not in such case be entitled to any fees.

Referees—how to be chosen. Who may be referee. Report.

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CHAPTER VI.

MANNER OF ENTERING JUDGMENT.

SEC. 298. Judgment may be for or against any of the parties to the action; may grant defendant affirmative relief. Complaint may be dismissed for neglect to prosecute the action. Judgment against married women.

299. The relief to be awarded to the plaintiff.

300. Rates of damages where damages are recoverable.

301. Judgment in action for recovery of personal property.

302. Judgment, how directed.

303. Clerk to keep a judgment-book.

304. Judgment to be entered in judgment-book.

305. Judgment-roll. Transcript of judgment filed in any other County—effect of.

SEC. 298. 1. Judgment may be given for or against one or more of several plaintiffs, and for or against one more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves.

Judgment may be for or against any of the parties—may grant defendant affirmative relief.

2. And it may grant to the defendant any affirmative relief to which he may be entitled.

3. In an action against several defendants, the Court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper.

Complaint may be dismissed for neglect to prosecute action.

4. The Court may also dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served.

In action brought by or against a married woman, judgment may be given against her as well for costs as for damages, or both for such costs and for such damages, in the same manner as against other persons, to be levied and collected of her separate estate, and not otherwise.

The relief to be awarded to plaintiff.

SEC. 299. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the Court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

Rate of damage where the damages are recoverable.

SEC. 300. Whenever damages are recoverable, the plaintiff may claim and recover, if he show himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action.

Judgment in action for recovery of personal property.

SEC. 301. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or the value thereof, in case a delivery cannot be had, and of damages for the detention. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

Judgment—how directed.

SEC. 302. Judgment upon an issue of law, or of fact found, or upon confession, or upon failure to answer, or upon report of referees (except

where the Clerk is authorized to enter the same, by the first sub-division of Section two hundred and sixty-nine, and by Section four hundred and one,) shall be entered upon the direction of a Judge, subject to review on appeal in the Supreme Court.

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SEC. 303. The Clerk shall keep among the records of the Court a book for the entry of judgment, to be called the "Judgment Book."

The Clerk to keep a judgment book.

SEC. 304. The judgment shall be entered in the Judgment Book, and shall specify clearly the relief granted, or other determination of the action.

Judgment to be entered in the judgment book.

SEC. 305. Unless the party or his attorney shall furnish a judgment roll, the Clerk, immediately after entering the judgment, shall attach together, and file the following papers, which shall constitute the judgment roll:

Judgment-roll.

1. In case the complaint be not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases, the summons, pleadings or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment.

A transcript of a final judgment, directing, in whole or in part, the payment of money, may be docketed with the Clerk of the Court of Common Pleas in any other County, and, when so docketed, shall have the same force and effect as a judgment of that Court.

Transcript of judgment filed in any other County, effect of.

TITLE IX.

OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

CHAPTER I. The execution.

II. Proceedings supplementary to the execution.

CHAPTER I.

THE EXECUTION.

SEC. 306. Execution within five years of course.

307. Execution can only be issued by leave of Court after five years.
Leave, how obtained.

308. Judgments, how enforced.

309. The different kinds of execution.

310. To what Counties execution may be issued. Execution against a married woman.

311. Execution against the person, in what cases.

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SEC. 314. Attachment of real estate made by lodging a copy of execution, and officer's return with Register of Deeds. Such attachment a lien for one hundred and twenty days.

315. Execution to be returnable in sixty days.

316. Personal property bound only by levy.

317. Existing laws, not inconsistent with this, relating to executions, continued until otherwise provided.

Writs of execution to be enforced.

SEC. 306. Writs of execution for the enforcement of judgments as now used are modified in conformity to this title, and the party in whose favor judgment has been heretofore, or shall hereafter be, given, and, in case of his death, his personal representatives duly appointed, may, at any time within five years after the entry of judgment, proceed to enforce the same, as prescribed by this title.

After five years to be issued only by leave of Court—Leave how obtained.

SEC. 307. After the lapse of five years from the entry of judgment, an execution can be issued only by leave of the Court, upon motion, with personal notice to the adverse party, unless he be absent or non-resident, or cannot be found to make such service, in which case such service may be made by publication, or in such other manner as the Court shall direct. Such leave shall not be given unless it be established by the oath of the party, or other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due. But the leave shall not be necessary when execution has been issued on the judgment within the five years, and returned unsatisfied in whole or in part.

When judgment shall have been rendered in a Court of a Trial Justice or other inferior Court in a city, and docketed in the office of the Clerk of the County, the application for leave to issue execution must be to the County Court of the County where the judgment was rendered.

Judgment—how enforced.

SEC. 308. Where a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced in those respects by execution, as provided in this title. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuse, he may be punished by the Court as for a contempt.

The different kinds of execution.

SEC. 309. There shall be three kinds of execution: One against the property of the judgment debtor; another against his person; and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the Court.

Execution to be issued, to what counties
Execution to issue against a married woman.

SEC. 310. When the execution is against the property of the judgment debtor, it may be issued to the Sheriff of any County where judgment is docketed. When it requires the delivery of real or personal property, it must be issued to the Sheriff of the County where the property, or some part thereof, is situated. Executions may be issued at the same time to different Counties.

Real property adjudged to be sold must be sold, in the County where it lies, by the Sheriff of the County or by a referee appointed by the Court for that purpose; and, thereupon, the Sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold.

An execution may issue against a married woman, and it shall direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise.

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SEC. 311. If the action be one in which the defendant might have been arrested, as provided in Section two hundred and two and Section two hundred and four, an execution against the person of the judgment debtor may be issued to any County within the jurisdiction of the Court, after the return of an execution against his property unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as in this Act provided, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by Section two hundred and two.

Execution to issue against the person, in what cases.

SEC. 312. The execution must be directed to the Sheriff, or Coroner, when the Sheriff is a party or interested, attested by the Clerk, subscribed by the party issuing it, or his attorney, and must intelligibly refer to the judgment, stating the Court, the County where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it be for money, and the amount actually due thereon, and the time of docketing in the County to which the execution is issued, and shall require the officer, substantially, as follows:

Form of the execution.

1. If it be against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of the personal property of such debtor; and if sufficient personal property cannot be found, out of the real property belonging to him.

2. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the officer to satisfy the judgment out of such property.

3. If it be against the person of the judgment debtor, it shall require the officer to arrest such debtor and commit him to the jail of the County until he shall pay the judgment or be discharged according to law.

4. If it be for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, or rents or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein; if a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of the real property belonging to him, and shall in that respect be deemed an execution against property.

SEC. 313. Final judgments, hereafter rendered, shall not of themselves constitute a lien upon real or personal property, or in any way bind the real or personal property of the judgment debtor: Provided, That the real or personal property attached and held on mesne process, in an action, shall continue bound until the expiration of one hundred and twenty days after final judgment is rendered, for the purpose of satisfying the same.

Final judgments, not a lien.

Attachment on mesne process a lien for one hundred and twenty days after the render of final judgment.

SEC. 314. When an officer holding an execution for collection shall be directed by the creditor, his agent or attorney, to levy the same on the real estate of the debtor, he may lodge in the office where by law a deed of such real estate is required to be recorded, a certified copy of such exe-

Attachment of real estate, how made.

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cution, with a certificate thereon, under his hand, stating that he is directed to levy the same on such real estate, substantially describing the same. The real estate thus described shall be held to satisfy such execution, for the term of one hundred and twenty days from the time of lodging the copy thereof; and when incumbered by previous attachments, or liens, the lien, thus created, shall remain, after the removal of such prior incumbrance, or lien, one hundred and twenty days.

The Register of Mesne Conveyance shall keep a record of such copy in the same manner as attachments on mesne process.

Attachment
alien for one
hundred and
twenty days.

SEC. 315. The execution shall be returnable, within sixty days after its receipt by the officer, to the Clerk with whom the record of judgment is filed. If the first execution is returned unsatisfied, in whole or in part, another execution, as of course, may be issued at any time within the period limited by this Act for issuing executions.

Personal prop-
erty bound
only by levy.

SEC. 316. The lodgment of executions, hereafter issued, with the Sheriff shall not bind the personal property of the debtor, but personal property shall only be bound by actual attachment or levy thereon.

Existing laws
not inconsis-
tent with this,
relating to ex-
ecution, con-
tinued, until
further provi-
sion be made.

SEC. 317. Until otherwise provided by the Legislature, the existing provisions of law, not supplied by, or in conflict with, this chapter, relating to executions and their incidents, the property liable to sale or execution, the sale thereof, the powers and rights of officers, their duties thereon, and the proceedings to enforce those duties, and the liability of their sureties, shall apply to the executions prescribed by this chapter.

CHAPTER II.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

SEC. 318. Order for discovery of property, examination of judgment debtor, &c.

319. Any debtor to execution debtor may pay his debt to Sheriff.

320. Examination of debtors of judgment debtor, or of those having property belonging to him.

321. Witnesses required to testify.

322. Compelling party or witnesses to attend.

323. What property may be ordered to be applied to the execution.

324. Judge may appoint receiver, and prohibit transfer of property.

325. Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor.

326. Reference by Judge.

327. Costs of proceeding.

328. Disobedience of order, how punished.

Order for dis-
covery of prop-
erty.
Examination
of the judg-
ment debtor,
&c.

SEC. 318. 1. When an execution against property of the judgment debtor, or any one of several debtors in the same judgment, issued to the Sheriff of the County where he resides, or has a place of business, or if he do not reside in the State, to the Sheriff of the County where a judgment-roll or a transcript of a Justice's judgment for twenty-five dol-

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lars or upwards, exclusive of costs, is filed, is returned unsatisfied, in whole or in part, the judgment creditor, at any time after such return made, is entitled to an order from a Judge of the Circuit Court, or requiring such judgment debtor to appear and answer concerning his property, before such Judge, at a time and place specified in the order, within the County to which the execution was issued. 2. After the issuing of an execution against property, and upon proof by affidavit, of a party or otherwise, to the satisfaction of the Court, or a Judge thereof, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such Court or Judge may, by an order, require the judgment debtor to appear at a specified time and place, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are provided upon the return of an execution. 3. On an examination under this Section, either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness. 4. Instead of the order requiring the attendance of the judgment debtor, the Judge may, upon proof by affidavit or otherwise, to his satisfaction, that there is danger of the debtor's leaving the State, or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the Sheriff of any County where such debtor may be to arrest him and bring him before such Judge. Upon being brought before the Judge, he may be examined on oath, and if it then appears that there is danger of the debtor's leaving the State, and that he has property which he has unjustly refused to apply to such judgment, ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the Judge as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the Judge, as for a contempt. 5. No person shall, on examination, pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. Nor shall he be excused from answering any question, on the ground that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

SEC. 319. After the issuing of execution against property, any person indebted to the judgment debtor may pay to the Sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution; and the Sheriff's receipt shall be a sufficient discharge for the amount so paid.

SEC. 320. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon an affidavit that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding ten dollars, the Judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place, and answer concerning the same. The Judge may also, in his

Any debtor may pay execution against his creditor.

Examination of debtors of the judgment debtor, or of those having property belonging to the said debtor. Joint debtors.

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discretion, require notice of such proceeding to be given to any party to the action, in such manner as may seem to him proper.

The proceedings mentioned in this Section, and in Section three hundred and eighteen, may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which said action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors to obtain satisfaction of judgments out of the property of joint debtors are maintainable in the like manner and to the like effect. These provisions shall apply to all proceedings and actions now pending, and not actually terminated by any final judgment or decree.

Witnesses required to testify.

SEC. 321. Witnesses may be required to appear and testify on any proceedings under this chapter, in the same manner as upon the trial of an issue.

Compelling party or witnesses to attend.

SEC. 322. The party or witness may be required to attend before the Judge, or before a referee appointed by the Court or Judge; if before a referee, the examination shall be taken by the referee, and certified to the Judge. All examinations and answers before a Judge or referee, under this chapter, shall be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof.

What property may be ordered to be applied to the execution.

SEC. 323. The Judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be so applied when it is made to appear, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor.

Judge may appoint receiver, and prohibit transfer, &c., of property. Order, &c.

SEC. 324. The Judge may also, by order, appoint a receiver of the property of the judgment debtor, in the same manner, and with the like authority, as if the appointment was made by the Court, according to Section two hundred and sixty-seven. But before the appointment of such receiver, the Judge shall ascertain, if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The Judge may also, by order, forbid a transfer or other disposition of the property of the judgment debtor not exempt from execution, and any interference therewith.

Whenever the Judge shall grant an order for the appointment of a receiver of the property of the judgment debtor, the same shall be filed in the office of the Clerk of the Court of Common Pleas of the County where the judgment roll in the action, or transcript from Trial Justice's judgment, upon which the proceedings are taken, is filed; and the said Clerk shall record the order in a book to be kept for that purpose in his office, to be called "Book of Orders Appointing Receivers of Judgment Debtors," and shall note the time of the filing of said order therein. A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judg-

ment debtor from the time of the filing and recording of the order as aforesaid. The receiver of the judgment debtor shall be subject to the direction and control of the Court in which the judgment was obtained, or docketed, upon which the proceedings are founded.

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But before he shall be vested with any real property of such judgment debtor, a certified copy of said order shall also be filed and recorded in the office of the Register of Mesne Conveyances of the County in which any real estate of such judgment debtor sought to be affected by such order is situated, and also in the office of the Register of Mesne Conveyances of the County in which such judgment debtor resides.

SEC. 325. If it appear that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver; but the Judge may, by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution; but such order may be modified or dissolved by the Judge granting the same, at any time, on such security as he shall direct.

Proceedings upon claim of another party or property, or on denial of indebtedness to judgment debtor.

SEC. 326. The Judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts, and may, in his discretion, appoint such referee in the first order, or at any time.

Reference by Judge.

SEC. 327. The Judge may allow to the judgment creditor, or to any party so examined, whether a party to the action or not, witnesses' fees and disbursements, and a fixed sum in addition, not exceeding thirty dollars, as costs.

Costs of proceeding.

SEC. 328. If any person, party or witness, disobey an order of the Judge or referee, duly served, such person, party or witness, may be punished by the Judge as for a contempt. And in all cases of commitment under this chapter, the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the Court or Judge committing him, or the Court in which the judgment was rendered, on such terms as may be just.

Disobedience of order, how punished.

TITLE X.

OF THE COSTS IN CIVIL ACTIONS.

SEC. 329. Existing statutes regulating costs repealed.

330. Costs, when allowed of course to the plaintiff.

331. Costs, when allowed of course to the defendant.

332. Costs, when allowed to either party, in the discretion of the Court.

333. Amount of costs allowed.

334. Allowance in addition to costs.

335. Allowance, how computed. Difficult and extraordinary cases.

336. Interest on verdict or report, when allowed.

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SEC. 337. Costs, how to be inserted in judgment. Adjustment of interlocutory costs.

338. Clerk's fees.

339. Referee's fees.

340. Costs on postponement of trial.

341. Costs on a motion.

342. Costs against an infant plaintiff.

343. Costs in an action by or against an executor or administrator, trustee of an express trust, or a person expressly authorized by statute to sue.

344. Costs on review of a decision of an inferior Court in a special proceeding.

345. Costs in an action by the State.

346. The like.

347. Costs against assignee after action brought, of cause of action.

348. Costs on a settlement.

Fee-bill abolished.

SEC. 329. All statutes establishing or regulating the costs or fees of attorneys, solicitors and counsel in civil actions are repealed; and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties. But there may be allowed to the prevailing party, upon the judgment, certain sums, by way of indemnity, for his expenses in the action, which allowances are in this Act termed costs.

When allowed of course to the plaintiff. Several actions on one instrument.

SEC. 330. Costs shall be allowed of course to the plaintiff, upon a recovery, in the following cases:

1. In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the Court to have come in question at the trial.

2. In an action to recover the possession of personal property.

3. In the actions of which a Court of Trial Justice has no jurisdiction.

4. In an action for the recovery of money, where the plaintiff shall recover fifty dollars. But in an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages. And in an action to recover the possession of personal property, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages, unless he recovers also property, the value of which, with the damages, amounts to fifty dollars, or the possession of property be adjudged to him, the value of which, with the damages, amounts to fifty dollars. Such value must be determined by the jury, court or referee by whom the action is tried. When several actions shall be brought on one bond, recognizance, promissory note, bill of exchange or other instrument in writing, or in any other case for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be allowed to the plaintiff in more than one of such actions, which shall be at his election: Provided, That the party or parties proceeded against in such other action or actions shall, at the time of the commencement of the previous action or actions, have been within this State and not secreted.

SEC. 331. Costs shall be allowed of course to the defendant in the actions mentioned in the last Section, unless the plaintiff be entitled to costs therein.

SEC. 332. In other actions, costs may be allowed, or not, in the discretion of the Court.

In all actions where there are several defendants not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the Court may award costs to such of the defendants as have judgment in their favor, or any of them.

In the following cases, the costs of an appeal shall be in the discretion of the Court:

1. When a new trial shall be ordered;
2. When a judgment shall be affirmed in part and reversed in part.

SEC. 333. When allowed, except in Courts of Trial Justices, costs shall be as follows:

1. To the plaintiff, for all proceedings before notice of trial, in actions where judgment for failure to answer can be taken without application to the Court, fifteen dollars; where judgment can only be taken on such application, twenty-five dollars; for all proceedings after notice of and before trial, fifteen dollars; for each additional defendant served with process, not exceeding ten, two dollars; and for each necessary defendant, in excess of that number, served with process, one dollar.

2. To the defendant, for all proceedings before notice of trial, ten dollars; and for all proceedings after notice of and before trial, fifteen dollars.

3. To either party for the trial of an issue of law, twenty dollars; for every trial of an issue of fact, thirty dollars; and where the trial shall necessarily occupy more than two days, ten dollars in addition hereto.

4. To either party, where a new trial shall be had, for all proceedings after the granting of and before such new trial, twenty-five dollars; for attending upon and taking the deposition of a witness conditionally, or attending to perpetuate his testimony, ten dollars; for drawing interrogatories to annex to a commission for the taking of testimony, ten dollars; for attending the examination of a party before trial, ten dollars; for making and serving a case, or case containing exceptions, twenty dollars, except that where the case shall necessarily contain more than fifty folios, there shall be allowed ten dollars in addition thereto; and for making and serving amendments thereto, ten dollars. To the plaintiff, for the appointment of a guardian of an infant defendant, ten dollars; but no more than ten dollars shall be allowed for the appointment of guardians in any one action. To the plaintiff, for procuring an order of injunction, ten dollars.

5. To either party on appeal to the Supreme Court before argument, thirty dollars; for argument, sixty dollars; and when a judgment is affirmed, the Court may, in its discretion, also award damages for the delay, not exceeding ten per cent. on the amount of the judgment; for preparing and serving a case, or case containing exceptions, in appeals to the Supreme Court, twenty dollars.

6. To either party, for every term, not exceeding five, at which the cause is necessarily on the calendar and is not tried, or is postponed by order of the Court, ten dollars; and for every term not exceeding ten, excluding the term at which the cause is argued in the Supreme Court, ten dollars; but in an action hereafter brought to recover dower, before

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When allowed to defendant.

When allowed to either party, in the discretion of the Court.

Amount of costs allowed.

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admeasurements of real property aliened by the husband, the plaintiff shall not recover costs, unless it appear that the dower was demanded before the commencement of the action and was refused.

The same costs shall be allowed to the plaintiff in proceedings under chapter two, title twelve, of the second part of this Code, (Sections three hundred and ninety-two to three hundred and ninety-eight,) as upon the commencement of an action.

Additional allowance.

SEC. 334. In addition to these allowances, there shall be allowed to the plaintiff, upon the recovery of judgment by him, in any action for the partition of real property, or for the foreclosure of a mortgage, or in any action in which a warrant of attachment has been issued, or for an adjudication upon a will or other instrument in writing, and in proceedings to compel the determination of claims to real property, the sum of ten per cent. on the recovery, as in the next Section prescribed, for any amount not exceeding two hundred dollars; an additional sum of five per cent. for any additional amount not exceeding four hundred dollars; and an additional sum of two per cent. for any additional amount not exceeding one thousand dollars.

And in the actions above named, if the same shall be settled before judgment therein, like allowances upon the amount paid or secured upon such settlement, at one-half the rates above specified.

Allowance, how computed. Difficult and extraordinary cases.

SEC. 335. These rates shall be estimated upon the value of the property claimed or attached or affected by the adjudication upon the will or other instrument, or sought to be partitioned, or the amount found due or unpaid upon the mortgage in an action for foreclosure. And whenever it shall be necessary to apply to the Court for an order enforcing the payment of an installment falling due, after judgment, in an action for foreclosure, the plaintiff shall be entitled to the rate of allowance in the last Section prescribed, but to no more in the aggregate than if the whole amount of the mortgage had been due when judgment was entered. Such amount of value must be determined by the Court or by the Commissioners, in case of actual partitions. In difficult and extraordinary cases, where a defence has been interposed, or in such cases where a trial has been had, and in actions or proceedings for the partition of real estate, the Court may also, in its discretion, make a further allowance to any party, not exceeding five per cent. upon the amount of the recovery or claim, or subject-matter involved.

Interest or verdict or report when allowed.

SEC. 336. When the judgment is for the recovery of money, interest, from the time of the verdict or report until judgment be finally entered, shall be computed by the Clerk, and added to the costs of the party entitled thereto.

Costs, how to be inserted in judgment. Adjustment of interlocutory costs.

SEC. 337. The Clerk shall insert in the entry of judgment, on the application of the prevailing party, upon five days' notice to the other, except when the attorneys reside in the same city, village, or town, and then upon two days' notice, the sum of the allowances for costs, as provided by this Code, the necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees, and the expense of printing the papers for any hearing, when required by a rule of the Court. The disbursements shall be stated in detail and verified by affidavit. A copy of the items of the costs and disbursements shall be served, with a notice of adjustment.

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Whenever it shall be necessary to adjust costs in any interlocutory proceeding in an action, or in any special proceedings, the same shall be adjusted by the Judge before whom the same may be heard, or the Court before which the same may be decided or pending, or in such other manner as the Judge or Court may direct.

SEC. 338. The Clerk shall receive :

On every trial, from the party bringing it on, two dollars; on filing transcript, twenty-five cents; Clerk's fees.

On entering judgment, fifty cents.

He shall receive no other fee for any services whatever, in a civil action, except for copies of papers, at the rate of ten cents for every hundred words.

SEC. 339. The fees of referees shall be three dollars to each, for every day spent in the business of the reference; but the parties may agree in writing upon any other rate of compensation. Referee's fees

SEC. 340. When an application shall be made to a Court or referees to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed, as the condition of granting the postponement. Of costs on the postponement of trial.

SEC. 341. Costs may be allowed on a motion, in the discretion of the Court or Judge, not exceeding ten dollars, and may be absolute or directed to abide the event of the action. Costs on a motion.

SEC. 342. When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor, and payment thereof may be enforced by attachment. Costs against infant plaintiff.

SEC. 343. In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered, as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected of the estate, fund, or party represented, unless the Court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in such action or defence. Costs in action by or against an executor or administrator, trustee of an express trust, or a person expressly authorized by statute to sue. Security for costs.

SEC. 344. When the decision of a Court of inferior jurisdiction in a special proceeding, including appeals from Probate Courts, shall be brought before the Circuit Court for review, such proceeding shall, for all purposes of cost, be deemed an action at issue, on a question of law, from the time the same shall be brought into Court, and costs thereon shall be awarded and collected in such manner as the Court shall direct, according to the nature of the case. Costs or review of a decision of an inferior Court in a special proceeding.

SEC. 345. In all civil actions, prosecuted in the name of the State, by an officer duly authorized for that purpose, the State shall be liable for costs in the same cases, and to the same extent as private parties. If a private person be joined with the State as plaintiff, he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the State till after execution issued therefor against such private party and returned unsatisfied. Costs in action by the State.

SEC. 346. In an action prosecuted in the name of the State, for the recovery of money or property, or to establish a right or claim for the benefit of any county, city, town, village, corporation or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was prosecuted, and not against the State. The same.

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Costs against
assignee after
an action com-
menced.

SEC. 347. In actions in which the cause of action shall, by assignment after the commencement of the action, or in any other manner, become the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party, and payment thereof may be enforced by attachment.

Costs on a
settlement.

SEC. 348. Upon the settlement, before judgment, of any action mentioned in Section three hundred and thirty, no greater sum shall be demanded from the defendant as costs than at the rates prescribed by that Section.

TITLE XI.

OF APPEALS IN CIVIL ACTIONS.

CHAPTER I. Appeals in general.

II. Appeals to the Supreme Court.

III. Appeal to the Circuit Court from an inferior Court.

CHAPTER I.

APPEALS IN GENERAL.

SEC. 349. Writs of error abolished, and appeals substituted.

350. Orders made out of Court, how vacated or modified.

351. Who may appeal.

352. Parties, how designated on appeal.

353. Appeal, how made.

354. Clerk to transmit papers to Appellate Court.

355. Intermediate orders affecting the judgment may be reviewed on the appeal from the judgment.

356. Judgment on appeal.

357. Time for appealing.

SEC. 349. Writs of error in civil and criminal actions, as they have heretofore existed, are abolished; and the only mode of reviewing a judgment or order in a civil or criminal action shall be that prescribed by this title.

Writs of er-
ror abolished
and appeals
substituted.

Orders made
out of Court,
how vacated
or modified.

SEC. 350. An order, made out of Court, without notice to the adverse party, may be vacated or modified, without notice, by the Judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made.

Who may ap-
peal.

SEC. 351. Any party aggrieved may appeal in the cases prescribed in this title.

Parties, how
designated on
appeal.

SEC. 352. The party appealing shall be known as the appellant, and the adverse party as the respondent. But the title of the action shall not be changed in consequence of the appeal.

Appeal, how
made.

SEC. 353. (1.) An appeal must be made by the service of a notice, in writing, on the adverse party, and on the Clerk with whom the judgment or order appealed from is entered, stating the appeal from the same or

some specified part thereof. (2.) When a party shall give, in good faith, notice of appeal from a judgment or order, and shall omit, through mistake, to do any other act necessary to perfect the appeal or to stay proceedings, the Court may permit an amendment on such terms as may be just.

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SEC. 354. If the appellant shall not, within twenty days after his appeal is perfected, cause a certified copy of the notice of appeal and of the judgment roll, or, if the appeal be from an order or any part thereof, a certified copy of such order, and the papers upon which the order was granted, to be transmitted to the Appellate Court by the Clerk with whom the notice of appeal is filed, the respondent may cause such certified copy to be transmitted by such Clerk to the Appellate Court, and recover the expenses thereof, as a disbursement on such appeal, in case the judgment or order appealed from shall be in whole or in part affirmed; and this provision shall apply to all appeals heretofore taken, where the appeal has not been dismissed in the manner provided by the rules of the Appellate Court.

Of transmission of papers to Appellate Court.

SEC. 355. Upon an appeal from a judgment, the Court may review any intermediate order involving the merits, and necessarily affecting the judgment.

Intermediate orders affecting judgment.

SEC. 356. Upon an appeal from a judgment or order, the Appellate Court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the Appellate Court may make complete restitution of all property and rights lost by the erroneous judgment.

Judgment on appeal. Restitution.

SEC. 357. The appeal to the Supreme Court under sub-division two of Section eleven of this Code, must be taken within sixty days after written notice of the order shall have been given to the party appealing; every other appeal allowed by the second chapter of this title must be taken within two years after the judgment shall be perfected by filing the judgment roll.

Time for appealing.

CHAPTER II.

APPEALS TO THE SUPREME COURT.

SEC. 358. Appeal, in what cases.

359. On appeal, security must be given or deposit made, unless waived.

360. On judgment for money, security to stay execution. New undertaking, on sureties in the first becoming insolvent.

361. If judgment be to deliver document or personal property, it must be deposited or security given.

362. If judgment be to execute conveyance, it must be executed and deposited.

363. Security where judgment is to deliver real property, or for a sale of mortgaged premises.

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SEC. 364. Stay of proceedings upon security being given.

365. Undertakings may be in one instrument or several.

366. Security to be approved and sureties to justify.

367. Perishable property may be sold, notwithstanding appeal.

368. Undertaking must be filed.

Appeal, in
what cases.
The Judgment
on a verdict subject to
opinion of the
Court.

SEC. 358. An appeal may be taken to the Supreme Court in the cases mentioned in Section eleven. When the Circuit Court shall render judgment upon a verdict taken, subject to the opinion of the Court, the questions or conclusions of law, together with a concise statement of the facts upon which they arose, shall be prepared by and under the direction of the Court, and shall be filed with the judgment roll, and be deemed a part thereof, for the purposes of a review in the Supreme Court.

The provisions of this Section shall apply to any judgment therein mentioned that has been heretofore rendered, and upon which an appeal has been brought and is now pending, or upon which an appeal shall hereafter be brought. When the return has already been filed with the Clerk of the Supreme Court such statement shall be filed with him, and be deemed a part of such return.

On appeal,
security must
be given, or
deposit made
unless waived

SEC. 359. To render an appeal effectual for any purpose, a written undertaking must be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding three hundred dollars, or that sum must be deposited with the Clerk with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking or deposit may be waived by a written consent on the part of the respondent.

On judgment
for money, se-
curity to stay
execution.
New under-
taking on su-
reties in first
becoming in-
solvent.

SEC. 360. If the appeal be from a judgment directing the payment of money, it shall not stay the execution of the judgment, unless a written undertaking be executed on the part of the appellant, by at least two sureties, to the effect that, if the judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. Whenever it shall be made satisfactorily to appear to the Court that since the execution of the undertaking the sureties have become insolvent, the Court may, by rule or order, require the appellant to execute, file and serve a new undertaking as above; and in case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring such new undertaking, the appeal may, on motion to the Court, be dismissed with costs. Whenever it shall be necessary for a party to any action or proceeding to give a bond or an undertaking with surety or sureties, he may, in lieu thereof, deposit with the officer or into Court, as the case may require, money to the amount for which such bond or undertaking is to be given. The Court in which such action or proceeding is pending may direct what disposition shall be made of such money, pending the action or proceeding. In any case where, by this Section, the money is to be deposited with an officer, a Judge of the Court, in term or at chambers, upon the application of either party, may, before such deposit is made, order it to be deposited in Court instead of with such officer; and a deposit made, pur-

suant to such order, shall be of the same effect as if made with such officer.

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SEC. 361. If the judgment appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered be brought into Court, or placed in the custody of such officer or receiver as the Court shall appoint, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the Court, or a Judge thereof, shall direct, to the effect that the appellant will obey the order of the Appellate Court upon the appeal.

If judgment or delivery of documents or personal property it must be deposited or security be given.

SEC. 362. If the judgment appealed from direct the execution of a conveyance or other instrument, the execution of the judgment shall not be stayed by the appeal until the instrument shall have been executed and deposited with the Clerk with whom the judgment is entered, to abide the judgment of the Appellate Court.

If to execute conveyance it must be executed and deposited.

SEC. 363. If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that, during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that, if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof, pursuant to the judgment, not exceeding a sum to be fixed by a Judge of the Court by which judgment was rendered, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency.

Security in a case where judgment is to deliver real property, or for a sale of mortgaged premises.

SEC. 364. Whenever an appeal is perfected, as provided by Sections three hundred and sixty, three hundred and sixty-one, three hundred and sixty-two, and three hundred and sixty-three, it stays all further proceedings in the Court below upon the judgment appealed from, or upon the matter embraced therein; but the Court below may proceed upon any other matter included in the action, and not affected by the judgment appealed from. And the Court below may, in its discretion, dispense with or limit the security required by Sections three hundred and sixty, three hundred and sixty-one and three hundred and sixty-three, when the appellant is an executor, administrator, trustee, or other person acting in another's right; and may also limit such security to an amount not less than fifty thousand dollars, in the cases mentioned in Sections three hundred and sixty-one, three hundred and sixty-two, three hundred and sixty-three, where it would otherwise, according to those Sections, exceed that sum.

Stay of proceedings upon security being given.

SEC. 365. The undertakings prescribed by Sections three hundred and fifty-nine, three hundred and sixty, three hundred and sixty-one, and three hundred and sixty-three, may be in one instrument or several, at the option of the appellant; and a copy, including the names and residence of the sureties, must be served on the adverse party, with a notice of appeal, unless a deposit is made as provided in Section three hundred and fifty-nine, and notice thereof given.

Undertakings may be in one instrument or several.

SEC. 366. An undertaking upon an appeal shall be of no effect, unless

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Security to
be approved
and to justify.

it be accompanied by the affidavit of the sureties that they are each worth double the amount specified therein. The respondent may, however, except to the sufficiency of the sureties, within ten days after the notice of the appeal; and unless they or other sureties justify before a Judge of the Court below, as prescribed by Sections two hundred and eighteen and two hundred and nineteen, within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification shall be upon a notice of not less than five days.

Perishable
property may
be sold, not-
withstanding
appeal.

SEC. 367. In the cases not provided for in Sections three hundred and sixty, three hundred and sixty-one, three hundred and sixty-two, three hundred and sixty-three, and three hundred and sixty-four, the perfecting of an appeal, by giving the undertaking mentioned in Section three hundred and fifty-nine, shall stay proceedings in the Court below upon the judgment appealed from, except that, where it directs the sale of perishable property, the Court below may order the property to be sold, and the proceeds thereof to be deposited or invested in this State or United States bonds, to abide the judgment of the Appellate Court.

Undertaking
must be filed.

SEC. 368. The undertaking must be filed with the Clerk with whom the judgment or order appealed from was entered. The provisions of this chapter as to the security to be given upon appeals, and as to the stay of proceedings, shall apply to appeals taken under sub-division three of Section eleven.

CHAPTER III.

APPEAL TO THE CIRCUIT COURT FROM AN INFERIOR COURT.

SEC. 369. By what Courts judgments to be reviewed. New trial.

370. Appeal, when to be taken.

371. Notice of appeal to be served on Justice, and costs of return to be paid.

372. Security to stay execution.

373. Form of undertaking.

374. Execution, how stayed.

375. In case of death of Justice, undertaking to be filed.

376. Filing in lieu of service of notice of appeal.

377. Return, when and how made and compelled.

378. How made if Justice be out of office.

379. Further return.

380. Justice dead, insane or absent.

381. Hearing upon return.

382. Appeal to be heard on the original papers.

383. Judgment on appeal. New trial.

384. Judgment roll.

385. Costs, how awarded.

386. Restitution.

387. Setting off costs and recovery.

388. The costs on appeal.

SEC. 369. When a judgment is rendered by a Trial Justice's Court,

by the County Commissioners, or any other inferior Court or jurisdiction, save the Probate Court heretofore provided for in this Act, the appeal shall be to the Circuit Court of the County wherein the judgment was rendered. On such appeal, when the amount of the claim or claims for which judgment was demanded by either party in his pleadings in the Court below shall exceed ten dollars, or when, in an action to recover the possession of personal property, the value of the property as assessed and the damages recovered shall exceed ten dollars, exclusive of costs, a new trial shall be had in the Circuit Court in the following appellate cases:

1. When the judgment was rendered upon an issue of law joined between the parties.

2. When it was rendered upon an issue of fact joined between parties, whether the defendant was present at the trial or not: Provided, however, That the appellant may, in case where the amount for which judgment is demanded by either party in his pleadings exceed ten dollars, or where, in an action to recover the possession of personal property, the value of the property as assessed and the damages recovered shall exceed ten dollars, exclusive of costs, state in the notice of appeal that such appeal is taken upon questions of law only, in which case a new trial shall not be had in the Appellate Court, but the appeal shall be heard and determined in the same manner as if such amount, or said value and damages were ten dollars or under.

SEC. 370. The appellant shall, within five days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process not personally served, and the defendant did not appear, he shall have five days, after personal notice of the judgment, to serve the notice of appeal provided for in this and the next Section.

SEC. 371. The notice of appeal must, within the same time, be served on the Trial Justice personally, if living and within the County, or on his Clerk, if there be one, and on the respondent personally, or by leaving it at his residence, with some person of suitable age and discretion; or, in case the respondent is not a resident of such County, or cannot, after due diligence, be found therein, in the same manner, on the attorney or agent, if any, who is a resident of such County, who appeared for the respondent on the trial; and if neither the respondent, nor such agent or attorney can be found in the County, the notice may be served on the respondent by leaving it with the Clerk of the Appellate Court; and the appellant must, at the time of the service of the notice of appeal on the Trial Justice or on his Clerk, as herein provided, pay to such Trial Justice or Clerk the costs of the action included in the judgment, together with two dollars, costs of the return, which shall be included in the judgments for costs on reversal. The appellant shall also execute, on the appeal, a written undertaking on his part, with one or more sufficient sureties, to the effect that the appellant will pay all costs, disbursements and extra costs, awarded against him in the Court below, if such judgment shall be affirmed by the Appellate Court, on such appeal, together with all costs and damages which may be awarded against him thereon; such sureties to justify in double the amount specified in the undertaking; such undertaking and the sufficiency of the sureties to be approved by the Trial Justice of the Court below, or the appellant may deposit, with the Clerk of the Court of Common Pleas, the costs, disbursements, and extra costs in-

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Judgment to
be reviewed,
by what Court
—new trial.

Appeal, when
to be taken.

Notice of ap-
peal to be served
on Trial
Justice, and
costs, &c., to
be paid.

A. D. 1870.

cluded in the judgment in the Court below, and the sum of fifteen dollars, to meet any costs that may be awarded against him on such appeal; the undertaking, when executed and approved, to be filed with the Clerk of the Circuit Court; the amount so deposited shall be repaid by the said Clerk to the appellant, if he succeed on the appeal; and in case the judgment be affirmed, the said Clerk shall, after the execution is issued, pay over the amount, so deposited, to the respondent, which shall be credited on the execution issued on the judgment of affirmance, to the extent thereof, and the balance, if any, on the execution issued on the judgment appealed from.

Security to stay execution.

SEC. 372. When, by the terms of Section three hundred and sixty-nine, the appellant is entitled to a new trial in the Appellate Court, he shall, at the time of making the appeal, and in all other cases, if he desires a stay of execution of the judgment, give security as provided in the next Section.

Form of undertaking.

SEC. 373. The security shall be a written undertaking, executed by one or more sufficient sureties, approved by the Court below, to the effect that if judgment be rendered against the appellant, and execution thereon be returned unsatisfied, in whole or in part, the sureties will pay the amount unsatisfied.

Execution, how stayed.

SEC. 374. The delivery of the undertaking to the Court below shall stay the issuing of execution; or, if it have been issued, the service of a copy of the undertaking, certified by the Court below, upon the officer holding the execution, shall stay further proceedings thereon.

In case of death of Justice, undertaking to be filed.

SEC. 375. Where, by reason of the death of a Trial Justice, or his removal from the County, or any other cause, the undertaking on the appeal cannot be delivered to him, it shall be filed with the Clerk of the Appellate Court, and notice thereof given to the respondent, or his attorney or agent, as provided in Section three hundred and fifty-four, it shall thereupon have the same effect as if delivered to the Trial Justice.

Filing in lieu of service of notice of appeal.

SEC. 376. When, by reason of the death of a Trial Justice, or his absence from the County, or any other cause, the notice of appeal cannot be served as provided by Section three hundred and seventy, it may be served by leaving the same with the Clerk of the County.

Return, when and how made and compelled.

SEC. 377. The Court below shall thereupon, after ten days, and within thirty days after service of the notice of appeal, make a return to the Appellate Court of the testimony, proceedings and judgment, and file the same in the Appellate Court. The return may be compelled by attachment. But no Justice of the Peace shall be bound to make a return unless the fees prescribed by the last Section of this chapter be paid on the service of the notice of appeal: Provided, however, That in cases where the amount for which judgment is demanded by either party in his pleadings in the Court below exceeds ten dollars, or where the value of the property recovered, as appears from the verdict or judgment, shall exceed ten dollars, the testimony need not be returned; but in such case, the Court below shall return the process by which the action was commenced, with the proof of service thereof, and the pleadings or copies thereof, the proceedings and judgment, together with a brief statement of the amount and nature of the claim or claims litigated by the respective parties, and in all cases the notice of appeal shall be annexed to the return; but in cases where the appellant shall, in accordance with the provisions of Section three hundred and sixty-nine of this Act, state in

the notice of appeal that such appeal is taken upon questions of law only, the Court below shall return to the Appellate Court the testimony, proceedings, and judgment.

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SEC. 378. When a Trial Justice, by whom a judgment appealed from was rendered, shall have gone out of office before a return is ordered, he shall, nevertheless, make a return in the same manner, and with the like effect, as if he were still in office.

How made if
Trial Justice
be out of office

SEC. 379. If the return be defective, the Appellate Court may direct a further or amended return as often as may be necessary, and may compel a compliance with its order by attachment. And the Court shall always be deemed open for these purposes.

Further re-
turn.

SEC. 380. If a Trial Justice whose judgment is appealed from shall die, become insane, or remove from the State, the Appellate Court may examine witnesses on oath, to the facts and circumstances of the trial or judgment, and determine the appeal, as if the facts had been returned by the Trial Justice. If he shall have removed to another County within the State, the Appellate Court may compel him to make the return, as if he were still within the County where the judgment was rendered.

Justice de-
ceased, insane
or absent.

SEC. 381. If a return be made, and the appeal is from a judgment where a new trial may not be had, as provided by this chapter, it may be brought to a hearing, upon notice by either party of not less than eight days. It shall be placed upon the calendar, and continue thereon without further notice until finally disposed of. But if neither party bring it to a hearing before the end of the second term, the Court shall dismiss the appeal, unless it continue the same by special order, for cause shown. If the appeal is from a judgment where a new trial may be had, it may be brought to a hearing or trial at any term of the Court at which a petit jury shall be summoned to attend, at least eight days before the Court, the party desiring to bring on the appeal shall serve a note of issue on the Clerk, and the Clerk shall thereupon enter the cause on the calendar, according to the date of the return.

Hearing up-
on return.
Dismissing
appeal if not
brought on.
New trials.

And the provisions of this chapter for a new trial shall apply as well to appeals heretofore taken and now pending, as those hereafter to be brought.

SEC. 382. The appeal shall be heard on the original papers, and no copy thereof need be furnished for the use of the Court.

To be heard
on the origin-
al papers.

SEC. 383. Upon hearing the appeal, the Appellate Court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the Court may affirm or reverse the judgment of the Court below, in whole or in part, and as to any or all the parties, and for errors of law or fact. If the appeal is founded on an error in fact in the proceedings, not affecting the merits of the action, and not within the knowledge of the Trial Justice, the Court may determine the alleged error in fact on affidavits, and may, in its discretion, inquire into and determine the same upon examination of the witnesses. If the defendant failed to appear before the Trial Justice, and it is shown by the affidavits served by the appellant, or otherwise, that manifest injustice has been done, and he satisfactorily excuses his default, the Court may, in its discretion, set aside or suspend judgment; and order a new trial before the same or any other Trial Justice in the same County, at such time and place, and on such

Judgment on
appeal.

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terms, as the Court may deem proper. Where a new trial shall be ordered before a Trial Justice, the parties must appear before him according to the order of the Court, and the same proceedings must thereupon be had in the action as on the return of a summons personally served. If the appeal shall be from a judgment in which a new trial may be had, as in this chapter provided, the Court shall proceed to the hearing of the cause, if the issue joined before the Trial Justice was an issue of law, or to the trial thereof by jury, if such issue was upon a question of fact.

1. If the issue joined before the Trial Justice was an issue of law, the Court shall render judgment thereon according to the law of the case; and if such judgment be against the pleadings of either party, an amendment of such pleading may be allowed on the same terms, and in like case, as pleadings in actions in the Circuit Court, and the Court may thereupon require the opposite party to answer such amended pleading, or join issue thereon, as the case may require, summarily.

2. If, upon an appeal in an issue of law, the Court should adjudge the pleading complained of to be valid, it shall, in like manner, require the opposite party summarily to answer such pleading, or join issue thereon, as the case may require.

3. Upon an issue of fact being so joined, the Court shall proceed to hear the same trial by a jury in the same manner as issues joined in the Circuit Court.

4. Every issue of fact so joined or brought upon an appeal shall be tried in the same manner as in actions commenced in the Circuit Court.

5. The Court shall have the same power over its own determinations, and the verdict of the jury, and shall render judgment thereon in the same manner as the Circuit Court in actions pending therein, and may allow either party to amend his pleadings upon such terms as shall be just in cases where a new trial may be had, as in this chapter provided; and in any such appeal on which a new trial is to be had, either party may, at any time before the trial, serve upon the opposite party an offer, in writing, to allow judgment to be taken against him for the sum or property, or to the effect in such offer specified, and with or without costs, as said offer shall specify. If the party receiving such offer accept the same, and give notice thereof in writing within ten days, he may file the return and offer, with an affidavit of service of notice of acceptance thereof, and the Clerk shall thereupon enter judgment according to said offer. And if the party making such offer shall have given an undertaking upon the appeal, the parties executing such undertaking shall be liable thereon for the payment of the judgment entered by virtue of said offer. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence. And, if the party to whom such offer is made fail to obtain a judgment more favorable to him than that specified in said offer, then he shall not recover costs, but must pay the other party's costs from the date of the service of the offer.

6. Either party may move for a new trial in said Court on a case or exception, or otherwise, and such motion may be made before or after judgment has been entered; and the provisions of this Act in relation to the proceedings on receiving the verdict of a jury, exceptions to the decisions of the Court, making and settling cases and exceptions, motions for new trials, and making up the judgment-roll in the Circuit Court, are

hereby made applicable to all appeals brought up for trial, as in this chapter provided.

A. D. 1870.

SEC. 384. To every judgment upon an appeal there shall be annexed the return on which it was heard, the notice of appeal, with any offer, verdict, decision of the Court, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment, which shall be filed with the Clerk of the Court, and shall constitute the judgment-roll.

Judgment-roll.

SEC. 385. If the judgment be affirmed, costs shall be awarded to the respondent. If it be reversed, costs shall be awarded to the appellant. If it be affirmed in part, the costs, or such part as to the Court shall seem just, may be awarded to either party.

Costs, how awarded.

SEC. 386. If the judgment below, or any part thereof, be paid or collected, and the judgment be afterwards reversed, the Appellate Court shall order the amount paid or collected to be restored, with interest from the time of such payment or collection. The order may be obtained on proof of the facts made at or after the hearing, upon a previous notice of six days; and if the order shall be made before the judgment is entered, the amount may be included in the judgment.

Restitution.

SEC. 387. If, upon an appeal, a recovery be had by one party, and costs be awarded to the other, the Appellate Court shall set off the one against the other, and render judgment for the balance.

Setting off costs and recovery.

SEC. 388. Costs shall be allowed to the prevailing party, in judgments rendered on appeal, in all cases, with the following exceptions and limitations: In the notice of appeal, the appellant shall state in what particular or particulars he claims the judgment should have been more favorable to him. If he claims that the amount of judgment is less favorable to him than it should have been, he shall state what should have been its amount. Within fifteen days after the service of the notice of appeal, the respondent may serve upon the appellant and Trial Justice an offer, in writing, to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal. The appellant may thereupon, and within five days thereafter, file with the Trial Justice a written acceptance of such offer, who shall thereupon make a minute thereof in his docket, and correct such judgment accordingly, and the same, so corrected, shall stand as his judgment, and be enforced accordingly; and any execution which has been issued upon the judgment appealed from shall be amended by the Trial Justice to correspond with the amended judgment; and no undertaking given to stay execution shall be enforced for more than the amount of the corrected judgment. If such offer be not made, and the judgment in the Appellate Court be more favorable to the appellant than the judgment in the Court below, or if such offer be made and not accepted, and the judgment in the Appellate Court be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs: Provided, however, That the appellant shall not recover costs unless the judgment appealed from shall be reversed on such appeal, or be made more favorable to him, to the amount of at least ten dollars. If the offer be made, and accepted by the appellant, the appellant shall recover all his disbursements on appeal, and all his costs in the Court below. But the appellant shall not recover costs, except as provided in this chapter. The respondent shall be entitled to recover costs where the appellant is not. Whenever costs are awarded to the appellant, he shall be allowed to tax as

The costs on appeal.

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part thereof the costs and fees paid to the Trial Justice, on making the appeal, as disbursements, in addition to the costs in the Appellate Court; and when the judgment in the suit before the Court below was against such appellant, he shall further be allowed to tax the costs incurred by him which he would have been entitled to recover in case the judgment below has been rendered in his favor. If, upon an appeal, a recovery for any debt or damages be had by one party, and costs be awarded to the other party, the Court shall set off such costs against such debt or damages, and render judgment for the balance. The following fees and costs, and no other, except fees of officers, disbursements and witnesses' fees, shall be allowed, on appeal, to the party entitled to costs, as herein provided, when the new trial is in the Circuit Court: For proceedings before notice of trial, five dollars; for all subsequent proceedings before trial, three dollars; for trial of an issue of law, five dollars; for every trial of an issue of fact, seven dollars; for argument of a motion for a new trial on a case or a bill of exceptions, five dollars; in all cases, to either party, for every term, not exceeding five, at which the appeal is necessarily on the calendar, and is not tried or is not postponed by the Court, five dollars. In other appeals the costs shall be as follows: To the appellant, on reversal, seven dollars; to the respondent, on the affirmance, seven dollars. If the judgment appealed from be reversed in part and affirmed as to the residue, the amount of costs allowed to either party shall be such sum as the Appellate Court may award, not exceeding five dollars. If the appeal be dismissed for want of prosecution, as provided by Section three hundred and eighty-one, no costs shall be allowed to either party. In every appeal, the Court below, before whom the judgment appealed from was rendered, shall receive one dollar for his return. If the judgment be reversed for an error of fact in the proceedings, not affecting the merits, costs shall be in the discretion of the Court. If, in the notice of appeal, the appellant shall not state in what particular or particulars he claims the judgment should have been more favorable to him, he shall not be entitled to costs unless the judgment appealed from shall be wholly reversed.

TITLE XII.

OF THE MISCELLANEOUS PROCEEDINGS IN CIVIL ACTIONS, AND GENERAL PROVISIONS.

CHAPTER I. Submitting a controversy without action.

- II. Proceedings against joint debtors, heirs, legatees, devisees, and tenants holding under a judgment debtor.
- III. Confession of a judgment without action.
- IV. Offers of the defendant to compromise the whole or a part of the action.
- V. Admission or inspection of writings.
- VI. Examination of parties.
- VII. Examination of witnesses.
- VIII. Motions and orders.
- IX. Entitling affidavits.

CHAPTER X. Computation of time.

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- XI. Notices, and filing and service of papers.
- XII. Duties of Sheriffs and Coroners.
- XIII. Accountability of Guardians.
- XIV. Powers of Referees.
- XV. Miscellaneous provisions.

CHAPTER I.

SUBMITTING A CONTROVERSY WITHOUT ACTION.

SEC. 389. Controversy, how submitted without action.

390. Judgment, how enforced.

391. Judgment, how enforced or appealed from.

SEC. 389. Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any Court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceeding in good faith, to determine the rights of the parties. The Court shall thereupon hear and determine the case, and render judgment thereon, as if an action were depending.

Controversy, how submitted without action.

SEC. 390. Judgment shall be entered in the judgment-book, as in other cases, but without costs for any proceeding prior to notice of trial. The case, the submission, and a copy of the judgment, shall constitute the judgment-roll.

Judgment.

SEC. 391. The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be subject to appeal in like manner.

Judgment, how enforced or appealed from.

CHAPTER II.

PROCEEDINGS AGAINST JOINT DEBTORS, HEIRS, DEVISEES, LEGATEES, AND TENANTS HOLDING UNDER A JUDGMENT DEBTOR.

SEC. 392. Parties, not summoned in action on joint contract, may be summoned after judgment.

393. If judgment debtor die, his representative may be summoned.

394. Form of summons.

395. Summons to be accompanied by affidavit of amount due.

396. Party summoned may answer and defend.

397. Subsequent pleadings and proceedings the same as in an action.

398. Answer and reply to be verified as in an action.

Parties not summoned in action on a joint contract may be summoned after judgment.

SEC. 392. When a judgment shall be recovered against one or more of several persons jointly indebted upon a contract, by proceeding as pro-

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If a judgment debtor die, his representatives to be summoned

vided in Section one hundred and fifty-nine, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned.

SEC. 393. In case of the death of a judgment debtor after judgment, the heirs, devisees or legatees of the judgment debtor, or the tenants of real property owned by him and affected by the judgment, may, at any time within three years from the time of granting letters testamentary or of administration upon the estate of the testator or intestate, be summoned to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands respectively; and the personal representatives of a deceased judgment debtor may be summoned at any time within one year after their appointment.

Form of summons.

SEC. 394. The summons provided in the last two Sections shall be subscribed by the judgment creditor, his representative or attorney, shall describe the judgment, and require the person summoned to show cause within twenty days after the service of the summons; and shall be served in like manner as the original summons.

To be accompanied by affidavit of the amount due.

SEC. 395. The summons shall be accompanied by an affidavit of the person subscribing it, that the judgment has not been satisfied, to his knowledge or information and belief, and shall specify the amount due thereon.

Party summoned to answer and defend.

SEC. 396. Upon such summons any party summoned may answer within the time specified therein, denying the judgment, or setting up any defence thereto which may have arisen subsequently to such judgment; and in addition thereto, if the party be proceeded against according to Section three hundred and ninety-two, he may make any defence which he might have made to the action if the summons had been served on him at the time when the same was originally commenced and such defence had been then interposed to such action.

Subsequent pleadings and proceedings same as in action.

SEC. 397. The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply; and the issues may be tried and judgment may be given in the same manner as in an action, and enforced by execution; or the application of the property charged to the payment of the judgment may be compelled by attachment, if necessary.

Answer and reply to be verified as in an action.

SEC. 398. The answer and reply shall be verified in the like cases and manner, and be subject to the same rules, as the answer and reply in an action.

CHAPTER III.

CONFESSION OF JUDGMENT WITHOUT ACTION.

SEC. 399. Judgment may be confessed for debt due or for contingent liability.

400. Statement in writing, and form thereof.

401. Judgment and execution.

Of judgment by confession.

SEC. 399. A judgment by confession may be entered, without action, either for money due, or to become due, or to secure any person against

contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

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SEC. 400. A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

Statement in writing and form thereof.

1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor.

2. If it be for money due or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due or to become due.

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same.

SEC. 401. The statement may be filed with a County Clerk, who shall endorse upon it, and enter in the Judgment Book a judgment for the amount confessed, with five dollars costs, together with disbursements. The statement and affidavit, with the judgment endorsed, shall thereupon become the judgment roll. Executions may be issued and enforced thereon, in the same manner as upon judgments in other cases in such Courts. When the debt for which the judgment is recovered is not all due, or is payable in installments, and the installments are not all due, the execution may issue upon such judgment for the collection of such installments as have become due, and shall be in the usual form, but shall have endorsed thereon, by the attorney or person issuing the same, a direction to the Sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, with interest thereon, and the costs of said judgment. Notwithstanding the issue and collection of such execution, the judgment shall remain as security for the installments thereafter to become due; and whenever any further installments become due execution may, in like manner, be issued for the collection and enforcement of the same.

Judgment & Execution.

CHAPTER IV.

OFFER OF THE DEFENDANT TO COMPROMISE THE WHOLE OR A PART OF THE ACTION.

SEC. 402. Offer of compromise.

403. Defendant may offer to liquidate damages.

404. Effect of acceptance or refusal of offer.

SEC. 402. The defendant may, at any time before the trial or verdict, serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accept the offer, and give notice thereof in writing within ten days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the Clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he cannot re-

Offer of compromise.

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cover costs, but must pay the defendant's costs from the time of the offer; and in case the defendant shall set up a counter claim in his answer to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, then the plaintiff may serve upon the defendant an offer in writing to allow judgment to be taken against him for the amount specified, or to allow said counter claim to the amount specified, with costs. If the defendant accept the offer, and give notice thereof in writing within ten days, he may enter judgment as above for the amount specified, if the offer entitled him to judgment, or the amount specified in said offer shall be allowed him in the trial of the action. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the defendant fail to recover a more favorable judgment, or to establish his counter claim for a greater amount than is specified in said offer, he cannot recover costs, but must pay the plaintiff's costs from the time of the offer.

Defendant
may offer to
quidate dam-
ages condi-
tionally.

SEC. 403. In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing, that if he fail in his defence, the damages be assessed at a specified sum; and if the plaintiff signify his acceptance thereof in writing, with or before the notice of trial, and on the trial have a verdict, the damages shall be assessed accordingly.

Effect of ac-
ceptance or
refusal of of-
fer.

SEC. 404. If the plaintiff do not accept the offer, he shall prove his damages as if it had not been made, and shall not be permitted to give it in evidence. And if the damages assessed in his favor shall not exceed the sum mentioned in the offer, the defendant shall recover his expenses incurred in consequence of any necessary preparation or defence in respect to the question of damages. Such expense shall be ascertained at the trial.

CHAPTER V.

ADMISSION OR INSPECTION OF WRITINGS.

Inspection
and copy of
books, papers,
&c., how ob-
tained.

SEC. 405. Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party, or his attorney, fail to give the admission, within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained at the trial, shall be paid by the party refusing the admission, unless it appear to the satisfaction of the Court that there were good reasons for the refusal. The Court before which an action is pending, or a Judge or Justice thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers and documents in his possession or under his control, containing evidence relating to the merits of the action or the defence therein. If compliance with the order be refused, the Court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both.

CHAPTER VI.

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EXAMINATION OF PARTIES.

SEC. 406. Action for discovery abolished.

407. A party may examine his adversary as a witness.

408. Such examination also allowed before trial. Proceeding therefor.

409. Party, how compelled to attend.

410. Testimony of party may be rebutted.

411. Effect of refusal to testify.

412. Testimony of a party not responsive to the inquiries may be rebutted by the oath of the party calling him.

413. Persons for whom action is brought or defended may be examined.

414. Examination of co-plaintiff or co-defendant.

SEC. 406. No action to obtain discovery under oath, in aid of the prosecution or defence of another action, shall be allowed, nor shall any examination of a party be had, on behalf of the adverse party, except in the manner prescribed by this chapter.

Action for discovery under oath abolished.

SEC. 407. A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner, and subject to the same rules of examination as any other witness, to testify, either at the trial, or conditionally, or upon commission.

A party may examine his adversary as a witness.

SEC. 408. The examination, instead of being had at the trial, as provided in the last Section, may be had at any time before the trial, at the option of the party claiming it, before a Judge of the Court, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the Judge order otherwise. But the party to be examined shall not be compelled to attend in any other County than that of his residence, or where he may be served with a summons for his attendance.

Such examination also allowed before trial: proceedings therefor.

SEC. 409. The party to be examined, as in the last Section provided, may be compelled to attend in the same manner as a witness who is to be examined conditionally; and the examination shall be taken and filed by the Judge in like manner, and may be read by either party on the trial.

Party, how compelled to attend.

SEC. 410. The examination of the party, thus taken, may be rebutted by adverse testimony.

Testimony of party, may be rebutted.

SEC. 411. If a party refuse to attend and testify, as in the last four Sections provided, he may be punished as for a contempt, and his complaint, answer or reply may be stricken out.

Effect of refusal to testify.

SEC. 412. A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf, subject to the same rules of examination as other witnesses. But if he testify to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto, or discharge when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such new matter, subject to the same rules of examination as other witnesses, and shall be so received.

Testimony by a party not responsive to the inquiries may be rebutted by oath of the party calling him.

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Persons for whom action is brought or defended may be examined.

Examination of co-plaintiff or co-defendant.

SEC. 413. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination, as if he were named as a party.

SEC. 414. A party may be examined on behalf of his co-plaintiff, or of a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered. And he may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken shall not be used in the behalf of the party examined. And whenever, in the case mentioned in Sections four hundred and seven and four hundred and eight, one of the several plaintiffs or defendants who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself as a witness to the same cause or action or defence, and shall be so received.

CHAPTER VII.

EXAMINATION OF WITNESSES.

SEC. 414. Interest not to exclude a witness.

415. Parties to actions and special proceedings may be witnesses on their own behalf, except in certain cases.

Interest not to exclude a witness.

Parties to actions and special proceedings may be examined as witnesses on their own behalf, except in certain cases.

SEC. 414. No person offered as a witness shall be excluded by reason of his interest in the event of the action.

SEC. 415. A party to an action or special proceeding in any and all Courts, and before any and all officers and persons acting judicially, may be examined as a witness on his own behalf, or in behalf of any other party, conditionally, on commission and upon the trial or hearing in the case, in the same manner and subject to the same rules of examination as any other witness: Provided, however, That no party to the action or proceeding, nor any person who has a legal or equitable interest which may be affected by the event of the action or proceeding, nor any person who, previous to such examination, has had such an interest, however the same may have been transferred to or come to the party to the action or proceeding, nor any assignor of anything in controversy in the action, shall be examined in regard to any transaction or communication between such witness and a person, at the time of such examination, deceased, insane or lunatic, as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next-of-kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic, when such examination or any judgment or determination in such action or proceeding, can in any manner affect the interest of such witness or the interest previously owned or represented by him. But when such executor, administrator, heir-at-law, next-of-kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf in regard to such transaction or communication, or the testimony of such deceased or insane person or lunatic in regard to

such transaction or communication, (however the same may have been perpetuated or made competent,) shall be given in evidence on the trial or hearing in behalf of such executor, administrator, heir-at-law, next-of-kin, assignee, legatee, devisee, survivor or committee, then all other persons not otherwise rendered incompetent shall be made competent witnesses in relation to such transaction or communication on said trial or hearing. Nothing contained in Section eight of this Act shall be held or construed to affect or restrain the operation of this Section.

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1. In any trial or inquiry in any suit, action or proceeding in any Court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended shall, except as hereinafter stated, be competent and compellable to give evidence, the same as any other witness, on behalf of any party to such suit, action or proceeding.

Husband or wife compell-
ed to testify.

2. Nothing herein contained shall render any husband or wife competent or compellable to give evidence for or against the other in any criminal action or proceeding, (except to prove the fact of marriage in case of bigamy,) or in any action or proceeding instituted in consequence of adultery, or in any action or proceeding for divorce on account of adultery, (except to prove the fact of marriage,) or in any action or proceeding for or on account of criminal conversation.

3. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage.

CHAPTER VIII.

MOTIONS AND ORDERS.

SEC. 416. Definition of an order.

417. Definition of a motion. Motions, how and when made. Stay of proceedings. Compelling parties to testify on motions. Decision on motion.

418. Notice of motion.

419. In absence, &c., of Judge at chambers, motion may be transferred to another Judge.

420. Enlarging time for the proceedings in an action.

SEC. 416. Every direction of a Court or Judge, made or entered in writing, and not included in a judgment, is denominated an order.

Definition of
an order.

SEC. 417. (1.) An application for an order is a motion.

(2.) Motions may be made to a Judge or Justice out of Court, except for a new trial on the merits.

Of motion,
how and when
made. Defini-
tion of a mo-
tion.

(3.) Orders made out of Court, without notice, may be made by the Judge of the Court, in any part of the State.

(4.) Motions upon notice must be made within the Circuit in which the action is triable, or, in the absence or inability of the Judge of the Circuit, may be made before the Judge of a Circuit adjoining that in which it is triable.

(5.) A motion to modify or vacate a provisional remedy, and an appeal

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Stay of proceedings.

from an order allowing a provisional remedy, shall have preference over all other motions.

(6.) No order to stay proceedings for a longer time than twenty days shall be granted by a Judge out of Court, except upon previous notice to the adverse party.

Compelling parties to testify.

(7.) When any party intends to make or oppose a motion in any Court of record, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such Court may, by order, appoint a referee to take the affidavit or deposition of such person. Such person may be subpoenaed and compelled to attend and make an affidavit before such referee, the same as before a referee to whom it is referred to try an issue. And the fees of such referee for such service shall be three dollars per day.

Decision on motion.

(8.) Whenever a motion shall be made in any cause or proceeding in any of the Courts in this State, to obtain an injunction order, order of arrest, or warrant of attachment, granted in any such case or proceeding, it shall be the duty of the Judge, Trial Justice, or other officer, before whom such motion is made, to render and make known his decision on such motion within twenty days after the day upon which such motion shall or may be submitted to him for his decision.

Notice of a motion.

SEC. 418. When a notice of a motion is necessary, it must be served four days before the time appointed for the hearing; but the Court or Judge may, by an order to show cause, prescribe a shorter time.

In absence, &c., of Judge at Chambers, motion may be transferred by him to another Judge.

SEC. 419. When notice of a motion is given, or an order to show cause is returnable before a Judge out of Court, and at the time fixed for the motion he is absent or unable to hear it, the same may be transferred, by his order, to some other Judge, before whom the motion, in case of his absence or inability, might originally have been made.

Enlarging time for proceedings in an action.

SEC. 420. The time within which any proceeding in an action must be had, after its commencement, except the time within which an appeal must be taken, may be enlarged, upon an affidavit showing grounds therefor, by a Judge of the Circuit Court. The affidavit, or a copy thereof, must be served with a copy of the order, or the order may be disregarded.

CHAPTER IX.

ENTITLING AFFIDAVITS.

Affidavits defectively entitled, valid.

SEC. 421. It shall not be necessary to entitle an affidavit in the action, but an affidavit made without a title, or with a defective title, shall be as valid and effectual, for every purpose, as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made.

CHAPTER X.

COMPUTATION OF TIME.

Time, how computed.

SEC. 422. The time within which an act is to be done, as herein pro-

vided, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

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CHAPTER XL

NOTICES AND FILING AND SERVICE OF PAPERS.

SEC. 423. Notices, &c., how served.

424. Service, how made.

425. Service by mail.

426. The like.

427. Double time where service by mail.

428. Notice of motion, &c., where personally served.

429. When papers need not be served on defendant.

430. Service of papers where parties reside out of the State.

431. Summons and pleadings to be filed.

432. Service on attorney.

433. When this chapter does not apply.

SEC. 423. Notices shall be in writing; and notices and other papers may be served on the party or attorney, in the manner prescribed in the next three Sections, where not otherwise provided by this Act.

Notices, &c.,
how served.

SEC. 424. The service may be personal, or by delivery to the party or attorney on whom the service is required to be made; or it may be as follows:

Service, how
made.

1. If upon an attorney, it may be made, during his absence from his office, by leaving it with the clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it, between the hours of six in the morning and nine in the evening, in a conspicuous place in the office; or, if it be not open so as to admit of such service, then by leaving it at the attorney's residence, with some person of suitable age and discretion.

2. If upon a party, it may be made by leaving the paper at his residence between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

SEC. 425. Service by mail may be made where the person making the service and the person on whom it is to be made reside in different places, between which there is a regular communication by mail.

Service by
mail.

SEC. 426. In case of service by mail, the paper must be deposited in the post office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid.

SEC. 427. When the service is by mail, it shall be double the time required in cases of personal service, except service of notice of trial, which may be made sixteen days before the day of trial, including the day of service.

Double time
when served
by mail.

SEC. 428. Notice of a motion or other proceeding before a Court or Judge, when personally served, shall be given at least four days before the time appointed therefor.

Of notice of
motion, &c.,
when person-
ally served.

SEC. 429. When a defendant shall not have demurred or answered, service of notice or papers in the ordinary proceedings in an action, need

When papers
need not be
served on de-
fendant.

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not be made upon him, unless he be imprisoned for want of a bail, but shall be made upon him or his attorney, if notice of appearance in the action has been given.

Service of papers where parties reside out of State.

SEC. 430. Where a plaintiff or a defendant who has demurred or answered, or gives notice of appearance, resides out of the State, and has no attorney in the action, the service may be made by mail, if his residence be known; if not known, on the Clerk, for the party.

Summons & Pleadings to be filed.

SEC. 431. The summons and the several pleadings in an action shall be filed with the Clerk within ten days after the service thereof, respectively; or the adverse party, on proof of the omission, shall be entitled, without notice, to an order from a Judge that the same be filed within a time to be specified in the order, or be deemed abandoned.

Service on attorney.

SEC. 432. Where a party shall have an attorney in the action, the service of papers shall be made upon the attorney, instead of the party.

When this chapter does not apply.

SEC. 433. The provisions of this chapter shall not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

CHAPTER XII.

DUTIES OF SHERIFFS AND CORONERS.

Duty of Sheriff and Coroner in serving or executing process, and how enforced.

SEC. 434. Whenever, pursuant to this Act, the Sheriff may be required to serve or execute any summons, order or judgment, or to do any other act, he shall be bound to do so in like manner as upon process issued to him, and shall be equally liable in all respects for neglect of duty; and if the Sheriff be a party, the Coroner shall be bound to perform the service, as he is now bound to execute process where the Sheriff is a party; and all the provisions of this Act relating to Sheriffs shall apply to Coroners where the Sheriff is a party.

CHAPTER XIII.

ACCOUNTABILITY OF GUARDIANS.

Guardian not to receive property until security given.

SEC. 435. No guardian appointed for an infant shall be permitted to receive property of the infant until he shall have given sufficient security, approved by a Probate Judge, to account for and apply the same under the direction of the Court.

CHAPTER XIV.

POWERS OF REFEREES.

Power of Referees.

SEC. 436. Every referee appointed pursuant to this Act shall have power to administer oaths in any proceedings before him, and shall have generally the powers now vested in a referee by law.

CHAPTER XV.

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MISCELLANEOUS PROVISIONS.

SEC. 437. Papers lost or withheld, how supplied.

438. Where undertakings to be filed.

439. Judgment on bond and warrant of attorney, executed before January 1, 1870.

440. Time for publication of notices, how computed.

441. Laws of other States and governments, how proved.

SEC. 437. If an original pleading or paper be lost or withheld by any person, the Court may authorize a copy thereof to be filed and used instead of the original. Papers lost or withheld, how supplied.

SEC. 438. The various undertakings required to be given by this Act must be filed with the Clerk of the Court, unless the Court expressly provides for a different disposition thereof, except that the undertakings provided for by the chapter on the claim and delivery of personal property, shall, after the justification of the sureties, be delivered by the Sheriffs to the parties respectively for whose benefit they are taken. Where undertakings to be filed.

SEC. 439. Upon any bond and warrant of attorney, executed and delivered before the first day of January, 1870, judgment may be entered in the manner prescribed by Sections three hundred and ninety-nine, four hundred, four hundred and one, upon the plaintiff's filing such bond and warrant of attorney, and the statement, signed and verified by himself, in the form prescribed by Section three hundred and ninety-nine. Judgment on bond and warrant of attorney executed before January 1, 1870.

SEC. 440. The time for publication of legal notices shall be computed so as to exclude the first day of publication, and include the day on which the act or event, of which notice is given, is to happen, or which completes the full period required for publication. The time for publication of notices, how computed.

SEC. 441. Printed copies in volumes of statutes, code or other written law enacted by any other State or Territory, or foreign Government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the Courts and judicial tribunals of such State, Territory or Government, shall be admitted by the Courts and officers of this State, on all occasions, as presumptive evidence of such laws. The unwritten or common law of any other State or Territory, or foreign Government, may be proved as facts by parol evidence; and the books of reports of cases adjudged in their Courts, may also be admitted as presumptive evidence of such law. Laws of other States and governments, how moved.

TITLE XIII.

ACTIONS IN PARTICULAR CASES.

CHAPTER I. Actions against foreign corporations.

II. Actions in place of *scire facias*, *quo warranto*, and of informations in the nature of *quo warranto*.

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CHAPTER I.

ACTIONS AGAINST FOREIGN CORPORATIONS.

Where and
by whom ac-
tion brought.

SEC. 442. An action against a corporation created by or under the laws of any other State, government, or country, may be brought in the Circuit Court:

1. By any resident of this State, for any cause of action.
2. By a plaintiff not a resident of this State, when the cause of action shall have arisen, or the subject of the action shall be situated, within this State.

CHAPTER II.

ACTIONS IN PLACE OF SCIRE FACIAS, QUO WARRANTO, AND OF INFORMATION IN THE NATURE OF QUO WARRANTO.

SEC. 443. Scire facias and quo warranto abolished, and this chapter substituted.

444. Action may be brought, by direction of the Legislature, by the Attorney-General, to vacate a charter.
445. Action to annul a corporation, when and how brought by the Attorney-General, by leave of the Supreme Court.
446. Leave to sue, how obtained.
447. Action upon information or complaint of course.
448. Action, when and how brought to vacate letters patent.
449. Relator, when to be joined as plaintiff.
450. Complaint and arrest of defendant in action for usurping an office.
451. Judgment in such actions.
452. Assumption of office, &c., by relator, when judgment is in his favor.
453. Proceedings against a defendant, on his refusal to deliver books or papers.
454. Damages, how recovered.
455. One action against several persons claiming office and franchise.
456. Penalty for usurping office or franchise, how awarded.
457. Judgment of forfeiture against a corporation.
458. Costs against a corporation, or persons claiming to be such, how collected.
459. Restraining corporation, and appointment of receiver.
460. Copy of judgment roll against corporation, where to be filed.
461. Entry of judgment relating to letters patent.
462. Action for forfeiture of property to the State.

SEC. 443. The writ of scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies heretofore obtainable in those forms may be obtained by civil actions under the provisions of this chapter. But any proceeding heretofore commenced, or judgment rendered, or right acquired, shall not be affected by such abolition.

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Scire facias and quo warranto abolished and this chapter substituted.

SEC. 444. An action may be brought by the Attorney-General, in the name of the State, whenever the Legislature shall so direct, against a corporation, for the purpose of vacating or annulling the act of incorporation, or an act renewing its corporate existence, on the ground that such act or renewal was procured upon some fraudulent suggestion or concealment of a material fact, by the persons incorporated, or by some of them, or with their knowledge and consent.

Action may be brought by Attorney-General to vacate a charter, by direction of the Legislature.

SEC. 445. An action may be brought by the Attorney-General, in the name of the State, on leave granted by the Supreme Court or a Justice thereof, or a Circuit Judge, for the purpose of vacating the charter or annulling the existence of a corporation, other than municipal, whenever such corporation shall—

Action to annul a corporation, when and how may be brought by Attorney-General, by leave of Supreme Court.

1. Offend against any of the provisions of this Act, or Acts creating, altering, or renewing such corporation; or,
2. Violate the provisions of any law by which such corporation shall have forfeited its charter by abuse of its powers; or,
3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers; or,
4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises; or,
5. Whenever it shall exercise a franchise or privilege not conferred upon it by law.

And it shall be the duty of the Attorney-General, whenever he shall have reason to believe that any of these acts or omissions can be established by proof, to apply for leave, and upon leave granted to bring the action, in every case of public interest, and also in every other case in which satisfactory security shall be given to indemnify the State against the costs and expenses to be incurred thereby.

SEC. 446. Leave to bring the action may be granted upon the application of the Attorney-General; and the Court or Judge may, at discretion, direct notice of such application to be given to the corporation or to its officers, previous to granting such leave, and may hear the corporation in opposition thereto.

Leave, how obtained.

SEC. 447. An action may be brought by the Attorney-General in the name of the State, upon his own information, or upon the complaint of any private party, or by a private party interested, on leave granted by a Circuit Judge, against the parties offending, in the following cases:

Action upon information or complaint.

1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; or,
2. When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall make a forfeiture of his office; or,
3. When any association or number of persons shall act within this State as a corporation, without being duly incorporated.

A. D. 1870.

Action, when and how to be brought to vacate letters patent.

SEC. 448. An action may be brought by the Attorney-General, in the name of the State, for the purpose of vacating or annulling letters patent granted by the people of this State, in the following cases:

1. When he shall have reason to believe that such letters patent were obtained by means of some fraudulent suggestion or concealment of a material fact, made by the person to whom the same were issued or made, or with his consent or knowledge; or,

2. When he shall have reason to believe that such letters patent were issued through mistake, or in ignorance of a material fact; or,

3. When he shall have reason to believe that the patentee, or those claiming under him, have done or omitted an act, in violation of the terms and conditions on which the letters patent were granted, or have by any other means forfeited the interest acquired under the same.

Relator, when to be joined as plaintiff.

SEC. 449. When an action shall be brought by the Attorney-General, by virtue of this chapter, on the complaint of any private party, or by a person having an interest in the question, the name of such person shall be joined with the State as plaintiff, and in every such case the Attorney-General or Circuit Judge, as the case may be, may require, as a condition precedent to bringing such action, that satisfactory security shall be given to indemnify the State against the costs and expenses to be incurred thereby; and in every case brought by the Attorney-General where such security is given, the measure of compensation to be paid by such person or persons to the Attorney-General shall be left to the agreement, express or implied, of the parties.

Complaint and arrest of defendant in an action for usurping an office.

SEC. 450. When such an action shall be brought against a person for usurping an office, the Attorney-General, or private party bringing the same, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a Judge of the Circuit or Justice of the Supreme Court for the arrest of such defendant, and holding him to bail; and thereupon he shall be arrested and held to bail, in the manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.

Judgment in such actions.

SEC. 451. In every such case, judgment shall be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice shall require.

SEC. 452. If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office; and it shall be his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody, or within his power, belonging to the office from which he shall have been excluded.

Proceedings against defendant, or refusal to deliver books or papers.

SEC. 453. If the defendant shall refuse or neglect to deliver over such books or papers, pursuant to the demand, he shall be guilty of a misdemeanor, and the following proceedings shall be had, to compel delivery of such books and papers:

A. D. 1870.

1. Whenever any person shall be removed from office, or the term for which he shall have been elected or appointed shall expire, he shall, on demand, deliver over to his successor all the books and papers in his custody, as such officer, or in any way appertaining to his office. Every person violating this provision shall be deemed guilty of a misdemeanor.

2. If any person shall refuse or neglect to deliver over to his successor any books or papers, as required in the preceding Section, such successor may make complaint thereof to any Judge of the Circuit Court, or Justice of the Supreme Court, where the person so refusing shall reside, and if such officer be satisfied by the oath of the complainant, and such other testimony as shall be offered, that any such books or papers are withheld, he shall grant an order directing the person so refusing to show cause before him, within some short, reasonable time, why he should not be compelled to deliver the same.

3. At the time so appointed, or at any other time to which the matter may be adjourned, upon due proof being made of the service of the said order, such officer shall proceed to inquire into the circumstances. If the person charged with withholding such books or papers shall make affidavit before such officer that he has truly delivered over to his successor all such books and papers in his custody, or appertaining to his office, within his knowledge, all further proceedings before such officer shall cease, and the person complained against shall be discharged.

4. If the person complained against shall not make such oath, and it shall appear that any such books or papers are withheld, the officer before whom such proceeding shall be had shall, by warrant, commit the person so withholding to the jail of the County, there to remain until he shall deliver such books and papers, or be otherwise discharged according to law.

5. In the case stated in the last Section, if required by the complainant, such officer shall also issue his warrant, directed to any Sheriff or Constable, commanding them in the day time to search such places as shall be designated in such warrant for such books and papers as belonged to the officer so removed, or whose term of office expired, in his official capacity, and which appertained to such office, and seize and bring them before the officer issuing the warrant.

6. Upon any books and papers being brought before such officer, by virtue of such warrant, he shall inquire and examine whether the same appertained to the office from which the person so refusing to deliver was removed, or of which the term expired, and he shall cause the same to be delivered to the complainant.

7. If any person appointed or elected to any office shall die, or his office shall in any way become vacant, and any books or papers belonging or appertaining to such office shall come to the hands of any person, the successor to such office may, in like manner as hereinbefore prescribed, demand such books or papers from the person having the same in his possession; and on the same being withheld, an order may be obtained, and the person charged may, in like manner, make oath of the delivery of all such books and papers that ever came to his possession; and in case of omission to make such oath, and to deliver up the books and papers so demanded, such person may be committed to jail, and a search warrant may be issued, and the property seized by virtue

A. D. 1870.

Damages—
how recovered.

thereof may be delivered to the complainant, as hereinbefore prescribed.

SEC. 454. If judgment be rendered, upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he shall have sustained by reason of the usurpation by the defendant of the office from which such defendant has been excluded.

One action
against sev-
eral persons
claiming of-
fice or fran-
chise.

Penalty for
usurping of-
fice or fran-
chise, how to
be awarded.

SEC. 455. Where several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

SEC. 456. When a defendant, whether a natural person or a corporation, against whom such action shall have been brought, shall be adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise, or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise, or privilege, and also that the plaintiff recover costs against such defendant. The Court may also, in its discretion, fine such defendant a sum not exceeding two thousand dollars, which fine, when collected, shall be paid into the Treasury of the State.

Judgment
of forfeiture
against a cor-
poration.

SEC. 457. If it shall be adjudged that a corporation against which an action shall have been brought pursuant to this chapter, has, by neglect, abuse or surrender, forfeited its corporate rights, privileges and franchises, judgment shall be rendered that the corporation be excluded from such corporate rights, privileges and franchises, and that the corporation be dissolved.

Costs against
a corporation
or persons
claiming to be
such. How to
be collected.

SEC. 458. If judgment be rendered in such action against a corporation, or against persons claiming to be a corporation, the Court may cause the costs therein to be collected by execution against the persons claiming to be a corporation, or by attachment or process against the directors or other officers of such corporation.

Restraining
a corporation
and appoint-
ment of recei-
ver.

SEC. 459. When such judgment shall be rendered against a corporation, the Court shall have power to restrain the corporation, to appoint a receiver of its property, and to take an account, and make distribution thereof among its creditors; and it shall be the duty of the Attorney-General, immediately after the rendition of such judgment, to institute proceedings for that purpose.

Copy of judg-
ment-roll a-
gainst corpo-
ration, where
to be filed.

SEC. 460. Upon the rendition of such judgment against a corporation, or for the vacating or annulling of letters patent, it shall be the duty of the Attorney-General to cause a copy of the judgment-roll to be forthwith filed in the office of the Secretary of State.

Entry of judg-
ment relating
to letters pa-
tent.

SEC. 461. Such Secretary shall thereupon, if the record relates to letters patent, make an entry in the records of the office of the Secretary of State, of the substance and effect of such judgment, and of the time when the record thereof was docketed; and the real property granted by such letters patent may thereafter be disposed of in the same manner as if such letters patent had never been issued.

Actions for
forfeiture of
property to
the State.

SEC. 462. Whenever, by the provision of law, any property, real or personal, shall be forfeited to the State, or to any officer for their use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer in the Circuit Court.

TITLE XIV.

A. D. 1870.

PROVISIONS RELATING TO EXISTING SUITS.

SEC. 463. Writ of error in all cases abolished. Appeal substituted.

464. Execution, when issuable on a judgment docketed before July 1st, 1870.

465. Application of this Act to actions pending. Extraordinary terms.

SEC. 463. No writ of error shall be hereafter issued in any case whatever. Wherever a right now exists to have a review of a judgment rendered, or order or decree made, before the first day of January, 1871, such review can only be had upon an appeal taken in the manner provided by this Act; but all appeals or writs of error heretofore taken from such judgments, orders or decrees, which are still pending in an Appellate Court, and not dismissed, shall be valid and effectual. But this Section shall not extend the right of review to any case or question to which it does not now extend, nor the time for appealing.

Writs of error in all cases abolished.
Appeal substituted.

SEC. 464. An execution may be issued, without leave of the Court, upon a judgment docketed before the first day of July, 1870, or now or hereafter to be rendered in an action pending on that day, at any time within five years after the rendering of the judgment.

Execution—when issuable on a judgment docketed July, 1870.

SEC. 465. The provisions of this Act apply to future proceedings in actions or suits heretofore commenced and now pending as follows:

Application of this Act to actions pending.

1. If there have been no pleading therein, to the pleadings and all subsequent proceedings.
2. When there is an issue of law or of fact, or any other question of fact to be tried, to the trial and all subsequent proceedings.

TITLE XV.

GENERAL PROVISIONS.

SEC. 466. Definition of real property.

467. Definition of personal property.

468. Definition of property.

469. Definition of Clerk.

470. Rule of construction.

471. Inconsistent statutory provisions repealed.

472. Inconsistent rules and practice abrogated.

473. Judges to meet and make general rules.

474. Justices of Supreme Court may make rules.

SEC. 466. The words "real property," and "real estate," as used in this Act, are co-extensive with lands, tenements, and hereditaments.

Definition of "real property."

A. D. 1870.

Definition of personal property.
Definition of "property."
Definition of "Clerk."

SEC. 467. The words "personal property," as used in this Act, include money, goods, chattels, things in action, and evidences of debt.

SEC. 468. The word "property," as used in this Act, includes property, real and personal.

SEC. 469. The word "Clerk," as used in this Act, signifies the Clerk of the Court where the action is pending, and, in the Supreme Court, the Clerk of the County mentioned in the title of the complaint, or in another County to which the Court may have changed the place of trial, unless otherwise specified.

Rules of construction.

SEC. 470. The rule of common law, that statutes in derogation of that law are to be strictly construed, has no application to this Act.

All statutory provisions inconsistent with this Act repealed.

SEC. 471. All statutory provisions inconsistent with this Act are repealed; but this repeal shall not revive a statute or law which may have been repealed or abolished by the provisions hereby repealed. And all rights of action given or secured by existing laws may be prosecuted in the manner provided by this Act. If a case shall arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this Act, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice.

All present rules & practice inconsistent with this Act abrogated.

SEC. 472. The present rules and practice of the Courts in civil actions, inconsistent with this Act, are abrogated; but when consistent with this Act, they shall continue in force, subject to the power of the respective Courts to relax, modify or alter the same.

The Justices and Judges to meet & make general rules.

SEC. 473. The Justices of the Supreme Court and the Judges of the Circuit Courts shall meet in general session on the first Tuesday in November, 1870, at the capital in Columbia, and in every two years thereafter. A majority of said Justices and Judges shall constitute a quorum. At such session they shall revise the general rules of the Circuit Court, make amendments thereto, and such further rules, not inconsistent with this Code, as may be necessary to carry it fully into effect.

Justices of the Supreme Court to make rules.

SEC. 474. The Justices of the Supreme Court shall from time to time make such rules for the orderly conduct of business in said Court, as they may deem proper, not inconsistent with this Act.

SEC. 475. Until the Legislature shall otherwise provide, the second part of this Act shall not affect proceedings by mandamus or prohibition.

Approved March 1, 1870.

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